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THE

MINING REPORTS.

A SERIES CONTAINING THE CASES ON THE

LAW OF MINES

FOUND IN THE AMERICAN AND ENGLISH REPORTS, ARRANGED ALPHABETICALLY BY SUBJECTS,

WITH NOTES AND REFERENCES.

By R. S. MORRISON,
OF THE COLORADO BAR.

VOL. IX.

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MINING REPORTS.

VOL. IX.

MARY GALE v. THE OIL RUN PETROLEUM CO., AND E. L. GALE.

(6 West Virginia, 200. Supreme Court of Appeals, 1873.)

[1] **Disclaimer of lessor's title and refusal to pay rent.** Plaintiff alleged that in 1854 she had purchased 2,000 acres of land; that in 1864, she with her husband, made a lease of 100 acres out of the tract, in consideration of $20,000 cash and a royalty in oil; that rent had been paid till 1872, when the defendant company, the assignee of her lessee, refused to pay any further royalty, alleging that a certain party had ordered it not to do so. Plaintiff claimed that the refusal to pay rent on the grounds alleged amounted to a disclaimer of her title, and that the corporation thereby forfeited its estate in the term under the deed of lease. *Held*, that the refusal to pay rent on the grounds stated did not work a forfeiture of the unexpired term.

No disclaimer by words alone. An estate for years, in land, created by deed, will not be forfeited by a simple refusal to pay rent, or by any mere words, where there is no open act of hostility to the lessor's title.

Injunction—Discretion. An application for an injunction is addressed to the sound conscience of the chancellor, acting upon all the circumstances belonging to each particular case.

COLE, for appellants.

BOGGESS, SANDS and HUTCHINSON, for appellee.

HAYMOND, President.

This is an appeal from orders made by a judge in vacation, in a case in Ritchie county, on the 4th day of June, 1872, upon the bill, and prayer therein of plaintiff.

[1] Must notify landlord when sued in ejectment, or he can not attorn to plaintiff even after recovery: *Lowe* v. *Emerson*, 48 Ill. 160.

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Plaintiff alleges that in 1854 she purchased, and had conveyed to her by Walter Keeler and wife, a certain tract of 2,000 acres of land, lying mostly in Ritchie county; that on or about the 27th day of December, 1864, she and her husband made a deed of lease to John S. Carlisle and others for one hundred acres of the land, described by metes and bounds, as set forth in the lease, for the term of twenty years from and after the 27th day of December, 1864, and that as rent for the use of the one hundred acres of land, one fourth part of all the oil that should be produced upon the land was reserved in the deed of lease; that after the execution of the deed of lease, the lessees and others organized a corporation by the name of The Oil Run Petroleum Company of West Virginia, for the purpose of mining, boring for and pumping oil upon the leased premises; that the company was created under the laws of this State, in the year 1865, having its principal office, or place of business, at or near Petroleum, in Ritchie county; that the company, by and through its agent and superintendent and under the terms and provisions of the lease, entered upon the one hundred acres of land as the tenant of plaintiff, and that as such lessee it has held and occupied the land, and has paid plaintiff, her husband and others, as agents of plaintiff, the rent oil reserved in the lease, and did not question the right and title of plaintiff in the leased premises until in March, 1872. That some time in March, 1872, the company, on demand being made, refused and failed to pay the rent then due, reserved in oil to plaintiff, or to her husband, or to any other person for her, "and did then and there allege, as grounds of such refusal and failure to pay rent oil, that a certain William Cady had notified and ordered the defendant, The Oil Run Petroleum Company, not to pay the said, or any rent, to either plaintiff or her husband. Plaintiff further alleges and insists that the said refusal to pay rent to her or to her agent, on the grounds stated, amounts to and is a disclaimer of the title of plaintiff in the one hundred acres of land, and that the defendant, the Oil Run Petroleum Company, has thereby forfeited its rights and interest in the term of years under the lease, and is not entitled to the use and occupation of the land demised, but is a stranger and trespasser thereon, and its possession thereof is a

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gross injury to plaintiff. That the one hundred acres of land have been mined and bored for oil, and the company have made subleases of various lots of the land, and that a number of wells have been sunk and oil obtained in profitable quantities from the same; that there has been a great yield of oil from the tract; that the average daily yield and production of oil from the wells is about 170 barrels, which is worth $3.75 per barrel; that the present and known corporators and stockholders of the company, as the plaintiff has been informed, believes and charges, are non-residents of this State, and that she has no security for the oil illegally produced and taken from the land held under the lease by the company, save and except the term of years yet to come, which plaintiff charges has been forfeited by the acts of the company, and the oil produced on the land, and the machinery placed thereon by the company, or its sub-tenants; that the names and interests of the sub-tenants of the company are so numerous and undefined that she can not name them; that in April, 1872, plaintiff commenced an action of ejectment against the company to recover the one hundred acres of land leased, on account of the breach of covenants of the lease by the company and for other just and sufficient causes, and that the action of ejectment is pending in the Circuit Court of Ritchie County. Plaintiff also charges that the company is operating the land and converting to its use the oils produced therefrom, regardless of the rights and interests of plaintiff; that the company has confederated with Cady, and others unknown, for the purpose of defrauding and depriving her of the property, the production of the wells, and the divestiture of her title in the land; that upon her information and belief she charges that the company threatens, by verbal and other acts, to continue to deny her title to the land, its use, the production and profits thereof, and to operate and transport away and convert into money, the oil, etc., produced and being on the land, so that an action sounding in damages would be wholly unavailing to recover the same; that the land is valuable only on account of the oils and minerals underlying the surface. The production, mining for, and pumping of the oil, and the taking of the other materials are acts of waste, and destructive of the value of the land, and will be, if permitted to continue, of great

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permanent injury and damage to the land. Plaintiff also charges that persons acting for the company on the land, as their agents or superintendents, are not reputed solvent, and are reputed incapable of satisfying her pecuniarily for the loss, waste, and damage done and threatened to the property.

The company and E. L. Gale, plaintiff's husband, are made defendants to the bill. An injunction prohibiting the company, its agents, etc., from operating upon the land in any manner, from taking, removing or in anywise disposing of the products of the land, oil or other thing, and from removing the oil on hand, and from selling or assigning the lease or any interest therein, and that a special receiver be appointed to take care of and operate the wells upon the land, and prevent the loss and waste thereof, and any fixtures or machinery thereon, during the pendency of the ejectment, etc., are prayed.

The deed of lease, which is filed as an exhibit, recites that in consideration of $20,000, in hand paid, Edmund L. Gale and Mary Gale, his wife, demise, etc., the land for the term stated in the bill, yielding therefor, in addition to the $20,000, one fourth part of the oil that may be produced from the land, the oil to be delivered in the tank or tanks, or to be filled in barrels to be provided by plaintiff and her husband; that the lease is made in fulfillment of a contract of lease between E. L. Gale and John S. Carlisle on the 5th day of November, 1864. E. L. Gale and plaintiff, his wife, warrant generally the premises conveyed for the term of twenty years. The lease is signed and sealed by E. L. Gale and Mary Gale, and was acknowledged by each of them before a notary according to law in December, 1867, and duly recorded in the recorder's office of Ritchie county. The orders of the judge granting the injunction and appointing a receiver as prayed for by the plaintiff, recite that notice was given to defendants of the application for the injunction, and the appointment of a receiver, and that the company appeared and filed its answer to the bill, to which the plaintiff replied generally; and the motion and application were heard upon the bill, affidavit thereto, the answer of defendant, and the affidavit thereto, and general replication to the answer. It is argued by the plaintiff's counsel that this court, in considering and determining whether the

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orders of the judge, which are appealed from, are erroneous, shall look alone to the bill and exhibits therewith filed; that the judge, in considering the motion for the injunction, etc., had no right to look into or consider the answer or exhibits therewith filed, etc. Without determining this question, at this point, I will proceed to examine whether, looking alone to the allegations of the bill and exhibits therewith filed, it was error in the judge to make the orders appealed from.

The case is important on account of the principle as well as the great amount of property involved in its determination. The principle involved is important not only to the parties to this suit, but to all persons within the State, occupying the relation of landlord and tenant.

The lease filed contains no covenant or condition for re-entry in case of failure or refusal to pay the rent, or for any other cause. The bill does not state whether plaintiff was married or single when the 2,000 acres of land were conveyed to her by Keller and wife; nor does it state the price paid for it, or that it is the separate property of plaintiff.

The deed from Keller and wife is not filed, and so far as I can see or determine from the bill the land was conveyed to plaintiff, either before or after marriage, without containing any words that would constitute it the separate property of plaintiff. I don't think it can be determined from the bill that the land is the separate property of the plaintiff. Courts of equity do not generally look with much favor upon penalties and forfeitures, and the enforcement thereof. One of the great objects in view in the original establishment of courts of equity was to relieve against penalties and forfeitures in cases where their enforcement was contrary to equity and good conscience. The right to an injunction is not *ex debito justitiæ*, but the application is addressed to the sound conscience of the chancellor, acting upon all the circumstances belonging to each particular case. The process of injunction should be applied with the utmost caution.

The interference rests on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right which, on just and equitable grounds, ought to be prevented: Hilliard on Injunctions, page 17, chapter 1, paragraph 18.

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The plaintiff predicates her right to recover, in the action of ejectment, the unexpired term of the lease, upon the supposition that the reversion in fee simple in the land, being vested in her, she, without reference to the marital rights of her husband, but in disregard thereof, has the right to treat the company as a wrongdoer and trespasser, because the company, in March, 1872, refused and failed to pay the rent reserved in oil to her, or to her husband, or any other person for her; and did then and there allege as ground of such refusal and failure to pay the rent oil, that a certain William Cady had notified and ordered the company not to pay the said, or any rent, to either the plaintiff or to her husband, though by the terms of the deed of lease bound so to do. In other words, she claims the right to recover the unexpired term in the lease, because she claims that the refusal and failure of the company to pay the oil rent in arrear, due by the terms of the lease, and the words stated in connection with the refusal, amounted to a disclaimer of her title, and that the disclaimer operates a forfeiture of the rights and interests of the company in the unexpired term of the lease, and she alone is entitled to recover the term. It is by reason of this alleged forfeiture of the unexpired term that the plaintiff claims her right of recovery in the ejectment, and her right to the injunction, and to compel the company to stop their large and doubtless profitable business of producing and selling oil; and also to have the company dispossessed of the land, all the machinery and oil already produced thereon, by a receiver appointed by the court, who is to take charge of the land and oil wells, and run and manage them until the ejectment case is determined, which may be a long or a short time. Is the claim of the plaintiff, in this respect, well founded in law or equity? In the case of *DeLancy* v. *Ganong*, determined in the Court of Appeals of the State of New York in 1853, and reported in 5 Selden's Reports, 9, it was decided that the denial, orally, by a tenant for life or years, of his landlord's title, and the assertion that he owns the lands in fee, and owes no rent for them, does not work a forfeiture of the term, or authorize the landlord to maintain ejectment for the lands demised. That *mere words* can never work a forfeiture of an estate for life, or for years; that default in the payment

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of the rent, when there is a covenant for its payment, and no condition in the lease providing for a re-entry in case of such default, does not work a forfeiture of the term. This case was ably discussed before the court, and Judge Denio delivered an able opinion in support of the principles determined by the court, reviewing the authorities upon the subject up to that time in England and America; and all the other judges of the court (except one who was not present at the argument) concurred in the opinion of Judge Denio. It will be seen by reference to the opinion of Judge Denio, that he cites and reviews a great number of cases and authorities, and that his opinion exhibits much learning and research upon the subject. To maintain ejectment for the non-payment of rent the demise must contain a proviso or condition for a re-entry: Same case, and Arch. Land. and Ten., 161; *Van Renselear* v. *Jewett* 2 Conn. 148; *Jackson* v. *Hogeboom*, 11 John. 163.

It is said that any act of the lessee, by which he disaffirms or impugns the title of his lessor, occasions a forfeiture of his lease; for to every lease the law tacitly annexes a condition that if the lessee do anything that may affect the interest of the lessor, the lease shall be void, and the lessor may re-enter: Bacon's Abr. Lease, T.; Woodfall, Land. and Ten., 150.

In the case of *Graves* v. *Wells*, 10 A. & E. 427, it was said: "No case has been cited where a lease for a definite term has been forfeited by mere words." "One thing in respect to a tenant's disclaimer of his landlord's title seems to be well settled: He can not set up an adverse claim which may operate to bar his lessor's title by adverse possession under the Statute of Limitations, until he shall have expressly disaffirmed such title of his lessor, and given him full notice that he claims to hold adversely thereto." 1 Washburn on Real Property, pages 377 and 378.

It will be observed by reading the authorities cited, that a distinction is made by many between tenants for years unexpired, and tenants from year to year, or at will. "It was probably also no ground of forfeiture of a lease for years at common law, though sometimes said to be, that a lessee had merely verbally asserted his own title to the premises, and on that ground refused to pay rent. Certainly a mere denial of the landlord's title by parol, or payment of rent to a stranger, will in neither

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case amount to a forfeiture of a term: Taylor's Landlord and Tenant, fifth edition, 385, 386. But independently of the common law doctrine of forfeiture, it is now held, at least in several of the United States, that if a tenant, even by mere words, distinctly repudiates the lessor's title and asserts one in himself, and this is made known to the lessor, the tenant's holding becomes adverse, and will in due time ripen into a fee by adverse possession, and therefore he is at once a trespasser, liable to ejectment or summary process by the lessor, and his tenancy, whether for years or at will, is forfeited: Taylor's Landlord and Tenant, 386, and cases there cited. I have not been able to see all the authorities cited by Taylor, but several of them which I have examined are cases of tenants from year to year, and at will. The case of *Willison* v. *Watkins*, 3 Peters' R., p. 43, is cited. This was a case of tenancy at will. It was ejectment brought thirty years after the tenant had openly disclaimed title under his landlord, with notice thereof to the landlord, and that he meant to hold from that time by his own title and an adverse possession. Judge Baldwin, in delivering his opinion in this case, said: "Here was no secret disclaimer, no undiscovered fraud; it was known to Bordeaux, and was notice to him that Willison meant to hold from that time by his own title and an adverse possession." "Had there been a formal lease for a term not then expired, the lessee forfeited it by his act of hostility." It is to be observed in that case, that the question of forfeiture of an unexpired term did not arise; but the question was, whether in such case the Statute of Limitations would run in favor of the tenant from the time of the disclaimer of the landlord's title, and notice to the landlord by the tenant that he meant, from the time of the disclaimer, to hold the land adversely, under his own title.

In the case of *Emerick, etc.*, v. *Tavenor*, 9 Grattan, 220, a forfeiture of an unexpired term was involved, and therefore the question now under consideration was not determined. Judge Lee, in his opinion in the case, incidentally refers to the case of *Willison* v. *Watkins*, 3 Pet., before cited, and quotes from it. In the case of *Emerick, etc.*, v. *Tavenor*, 9 Grattan, the tenant had, about the time he quit the premises, conveyed them in fee to another person, who took possession and claimed

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to hold adversely in fee, under the deed; and Judge Lee says, "It has been held that, though the party purchase and enter upon the premises under an absolute conveyance, he still, in judgment of law, is deemed to have entered as the tenant of the landlord." And he further says, in substance, the conveyance under the statute of uses (such as the conveyance in that case) could not have the effect of a forfeiture, because it passed no greater interest than the tenant could lawfully convey, which was the *interesse termini* only, and this would not affect the rights and interests of the landlord; but that anciently it was otherwise. See 9 Grattan, 225. The general rule is stated to be, that a tenant should not be permitted to contest his landlord's title.

The rule is founded upon principles of justice and good faith. This rule, however, is not universally adhered to. It has its exceptions, which are as wise and just in principle as the rule itself. In the case of *Alderson* v. *Miller*, 15 Grattan, R. 279, it was determined by the court that "though, as a general rule, a tenant is not allowed to question his landlord's title, yet if a person in possession of land, claiming title to it, is by fraud or mistake induced to believe that another has a better right to it, and to take a lease from him, in an action by the landlord to recover possession the tenant may set up such fraud or mistake and show that he has a good title to the property." And Judge Allen said in that case: "But a principle adopted to promote justice and good faith must not be used as an instrument of fraud and violence."

I think it clear that a failure or refusal of a tenant to pay rent to his landlord will not work a forfeiture of the unexpired term by the common law. According to allegations of the bill, the reasons assigned by the defendant for refusing to pay the rent do not amount to a disclaimer of the plaintiff's title. The defendant did not claim title in itself, or to hold adversely to the plaintiff, or to hold under any title adverse to the title of its landlord; nor can such be the necessary meaning or effect of the words alleged in the bill by a fair construction.

The company did not claim the right to pay the rent to Cady, nor did it assert the right of Cady to receive the rents by reason of a right or title adverse to plaintiff's title. It is

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charged to have said when it refused to pay rent, "that a certain William Cady had notified and ordered it not to pay the said, or any rent to either plaintiff or her husband." The company did not thereby say how Cady claimed the rent, whether by a title adverse to the plaintiff, or derived from the plaintiff or her husband by deed or assignment, or otherwise. A party claiming the benefit of a forfeiture of an unexpired term, especially by mere words and a refusal to pay rent, should be held to clear and satisfactory proof. The words proven or relied on should be clear and distinct in their meaning, and not leave reasonable doubt as to the true meaning of the party using them. The plaintiff in her bill does not contest or impeach the deed of lease, or complain that the company did anything on the land prior to March, 1872, not authorized by the lease. If she recovers in the ejectment case, for anything that appears it must be by reason of the forfeiture of the unexpired term of the lease. Under the allegations of the bill I think it is clear that E. L. Gale, by virtue of his marital right as the husband of the plaintiff, became vested with an estate in the 100 acres of land, amounting at least to an estate during the joint lives of plaintiff and himself, and that E. L. Gale, his vendees or assignees, by reason thereoff became entitled to the possession and use of the 100 acres of land until the determination of the estate. I do not mean or intend to be understood as determining what are the rights of plaintiff and her husband as to the oil rents under the lease. This question does not properly arise, as between the company and the plaintiff in this case, under the allegations of the bill. The question is involved in another case now before this court, between other parties.

From the confusion of the authorities it is difficult to define with clearness and satisfaction what words and acts will work a forfeiture of an unexpired term for years. By the common law, a tenant for life may forfeit his estate by disclaiming to hold of his lord, or by affirming or impliedly admitting the reversion to be in a stranger. This doctrine is founded in a rule of the feudal law, that if the vassal denied the tenure he forfeited his feud. Now, this denial may be when the vassal claims the reversion himself, or accepts a gift of it from a stranger; for in all these cases he denies that he holds the

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feud from the lord. But as by the feudal law, the vassal was to be convicted of this denial, so, in the English law, those acts which plainly amount to a denial must be done in a court of record, to make them a forfeiture, because such act of denial appearing on the record is equivalent to a conviction upon solemn trial. All other denials, that might be used by the great lords for trepanning their tenants, and for a pretense to seize their estates, were, by our law, rejected, for such convictions might be obtained without any just cause; but the denial of tenure upon record could never be counterfeited or abused to any injustice: 1 Lomax's Digest, 45.

No estate of inheritance or freehold, or for a term of more than five years, in lands, shall be conveyed, unless by deed or will: Code of West Va., chapter 71, section 1. The deed of lease in this case was made, acknowledged, delivered and admitted to record in all respects according to law.

It contains a covenant of general warranty.

The consideration paid for the lease was $20,000, cash in hand, in addition to the large oil rent reserved. There is no covenant or provision in the deed providing for a forfeiture of the lease for any cause. It is claimed that the common law attaches to the deed of lease an implied contract between the landlord and tenant; that if the tenant disclaims the landlord's title, by refusing to pay the rent, or claiming title adverse to the landlord's title, by mere words, such disclaimer works a forfeiture of the unexpired term of the deed of lease, and vests the same in the landlord as effectually and perfectly as if the forfeiture had been stipulated for in the deed, no matter whether such unexpired term be five years, more or less. I can not agree that this proposition properly states the law; and to so hold would operate great mischief and injustice. It would make the title to lands for a term of years, created by solemn deed, quite precarious and uncertain.

An estate for a fixed number of years created by deed in lands, as in the case under consideration, is not forfeited by a simple refusal to pay rent, or any mere words, where there is no open act of unmistakable hostility by the tenant to the landlord's title, his grantees or assignees, with full notice of his adverse title, or assertion of adverse title, and of his holding possession of the premises adversely to the landlord, his

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grantees or assignees, where no condition or covenant of forfeiture is contained in the deed of lease, especially when the term exceeds five years.

The landlord has, over and beyond the remedies provided for other creditors, the remedy by distress for rent in arrear.

This is a privilege exclusive to the landowning class, and is a relic of feudalism; still it has received legislative approval and public sanction, and I do not condemn it. I only allude to it as being of an ancient system of which the subject under consideration was a part. I have considered this case, as though the company had not answered. As a general rule where a bill for a preliminary injunction is presented to a chancellor for his consideration and action, upon notice or otherwise, it is not proper for him to receive and consider the defendant's answer, as an answer upon the application, without the consent of the plaintiff. As the plaintiff made no objection to the filing of the answer of the company, but filed her general replication thereto, it might perhaps be intended that she consented that the court should hear the application for the injunction upon the bill, answer, general replication, affidavits and exhibits; but I will not determine that question, as I deem it unnecessary. If the unexpired term in the lease is not forfeited, as I have held, it is clear from the allegations of the bill that there is an abundance of property liable for the oil rent, by distress or other remedy, to whomsoever the rent is due.

For these reasons, the order of the judge granting the injunction awarded in this cause on the 4th day of June, 1872, and also the order made on the 3rd day of June, 1872, appointing a special receiver to take charge of the property in the bill and order mentioned of the same date, and from which the appeal in this cause is taken, must be reversed, as being improvidently granted and made, and the injunction dissolved, and the bill dismissed with costs to defendant in the court below; and the Oil Run Petroleum Company must recover against Mary Gale its costs in this court expended. All which must be certified to the Circuit Court of Ritchie county.

HOFFMAN, PAULL and MOORE, Judges, concur in the foregoing opinion.

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GANTER ET AL. V. ATKINSON ET AL.

(35 Wisconsin, 48. Supreme Court, 1874.)

[1] **Lease distinguished from license—[2] Trespass by lessees.** By oral agreement the owner of certain land gave plaintiffs the right to enter thereon for mining purposes, and the exclusive right to mine in or upon the same and to take away ore therefrom for a certain rent in kind: *Held*, that plaintiffs thereby acquired an interest in the land and might maintain an action of trespass against third persons for mining upon and taking ore from such land.

Statute of Frauds not invoked to favor trespasser. An oral lease of land for a longer period than one year is void; but where the term for which the lease was given does not appear, it will not be assumed that it was within the statute, although the plaintiffs may have held under it for more than a year; against trespassers it would be assumed that they held as tenants from year to year.

Appeal from the Circuit Court of Grant County.

The complaint alleged that a certain tract of mining land, comprising forty acres, was the property of Nelson Dewey; that one Turley was the agent of Dewey in charge of the land, and empowered to make contracts with miners for working it, and that Turley by a verbal contract with plaintiffs gave them the sole right to mine for lead ore in a certain part of said tract upon the following conditions, viz.: plaintiffs were to begin work at the bottom of a hole already sunk, about midway between the north and south boundaries of the land, and about 200 feet west from the east boundary, and were to run a drift quartering to a point on the east boundary line a little south of southeast from said hole. They were to have the exclusive right to work and take out all ore found in the drifts, or in the crevices or opening between the line of the drift and the east boundary line of the land. They were also to have the exclusive right to take ores out of or to mine upon the triangular piece of land bounded by a line drawn directly eastward from said hole to the east line of the forty, by said east line and by a line between said hole and the point where

[1] *Gillett* v. *Treganza*, 7 M. R. 432, distinguished.

[2] *Harker* v. *Birbkeck*, 3 Burr. 1556; *Attersoll* v. *Stevens*, 10 M. R. 67.

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said drift was to strike the east line. In consideration of these rights plaintiffs were to pay to Dewey one eighth of the ores which they might take out. It is further alleged that "it was the intention of the said agent to give the plaintiffs a written lease to mine upon said land with the rights aforesaid, but he omitted and neglected to do so." It is then alleged that after plaintiffs had begun to work on their quartering drift as aforesaid, defendants wrongfully ran a drift east and west intersecting plaintiffs' drift, following a crevice which ran from beyond the east line of the forty acres westward across said triangular piece of land; and that they took out of said crevice large quantities of valuable ore to which plaintiffs had the exclusive right and sold and converted the same to their own use, and refused to pay the proceeds to plaintiffs. Judgment is demanded for the value of this ore. Defendants demurred generally to the complaint, and appealed from an order overruling their demurrer.

WM. E. & GEO. B. CARTER, for appellants.

BARBER & CLEMENSTON, for appellees.

COLE, J.

We are inclined to agree with the counsel for the defendants in the proposition that upon the facts stated in the complaint it appears that the plaintiffs had an interest in the premises described and in the lead ore or minerals in the land which amounted to something more than a mere license. It is quite analogous to a demise or lease of a particular tract of ground with the right or authority to work and mine thereon for minerals, together with the right to have and enjoy all such minerals as they should find or discover upon paying the specified rent; for it is alleged that by the verbal contract or agreement made with them by Mr. Turley, the agent of Gov. Dewey, they had the right and privilege of entering upon the land to commence mining operations, and that it was agreed that they should commence work at the bottom of a particular hole or shaft therein mentioned, and were to run a drift or level from that point quartering to a point on the

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east boundary line of the forty acre tract a little south of southeast from this shaft, and that they were to have the exclusive right to work and take out all lead ore or other precious ore found in the drift or level, and also the exclusive right to work and take out all lead ore or other precious ore which should be found in any crevices or openings between the line of said drift and the east boundary line of the forty, which the drift would intersect on being extended as contemplated; and "they and they only had the right to take away ores out of, or to mine in or upon the triangular piece of land" described by metes and bounds.

Now it seems to us that this verbal agreement is not really distinguishable in its character from a parol lease of a specified tract of land with the exclusive right to search for lead ore or other minerals and prosecute mining operations thereon. It does give the plaintiffs an interest in the land, and property in the minerals which they should find within the specified limits. The plaintiffs were put in possession and had, according to the complaint, the sole and exclusive right to run their level and to carry on their mining operations, and were to have all the lead ore or minerals which they should dig or discover upon the tract, subject to the payment of one eighth part of the ores which they might take out of said piece of ground as rent to Gov. Dewey. We really can not see that the case would have been different if this particular piece of ground had been demised to the plaintiffs to cultivate, or for any other purpose. If the agreement then does create an interest in the land and in the minerals therein found or discovered, the question arises, is such a contract void under the Statute of Frauds? The statute declares that no estate or interest in lands other than leases for one year, shall be created or granted, except by an instrument in writing subscribed by the party creating the same: Ch. 106 R. S. The complaint in this case fails to show the period this lease was to continue. We can not assume that the premises were demised for more than one year. It is true it appears the plaintiffs have worked over a year under the parol contract. Precisely what their rights would be in the triangular piece of ground leased as respects Gov. Dewey, after the expiration of a year, is a question we need not consider. It is sufficient to say that the ver-

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bal arrangement and contract made by Turley with the plaintiffs amounted probably to a lease from year to year of that specified tract for mining purposes. If this view be correct, then it seems to us that, as respects the defendants, they were simply wrongdoers in mining upon ground which had been expressly leased to the plaintiffs and from which they were restricted from extending their mines and drifts. They had no right, according to the complaint, to follow any crevice across the east line of the forty upon which the plaintiffs were mining and onto the triangular piece of ground which the latter had the exclusive right to mine upon. This to our minds is very plain. The defendants, without right or authority, followed their drift or crevice onto the plaintiffs' ground and removed mineral from premises which, upon the averments of the complaint, they were expressly prohibited from mining upon. It seems to us that if such were the facts they must account for the mineral which they have wrongfully and unjustly taken from this triangular piece demised to the plaintiffs.

The case of *Gillett* v. *Treganza*, 6 Wis. 343, was referred to on the argument by counsel on both sides as though it had a direct bearing upon the question here to be decided. That case, however, is quite distinguishable in its facts from the one before us. It was an action of replevin brought by the miner against the owner of the land for wrongfully taking mineral which the defendants had dug and raised from a certain range which the plaintiffs had, or claimed to have, the sole and exclusive right and privilege to mine upon. It was held that the agreement in that case only gave the plaintiffs the right of digging or searching for lead ore upon the range, but did not grant or demise the mineral or lead ore in the land itself, so as to vest in them the general or special property in the mineral, with the right of possession, which was essential to maintain an action of replevin. The parol contract in this case, we think, amounts to a lease of the triangular piece of ground for mining purposes, with the minerals or lead ore therein comprised. And the contest is not between the owner of the land and the lessees, but between the lessees and trespassers. See the case of *Beatty* v. *Gregory*, 17 Iowa, 109.

The view we have taken of the case relieves us from the

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necessity of considering whether the plaintiffs, upon the facts stated, could maintain the action under the provision of Ch. 260, Laws of 1860, as amended by Ch. 117, Laws of 1872. That point was very fully discussed upon the argument; but we express no opinion upon it.

By the Court.—The order of the circuit court overruling the demurrer to the complaint is affirmed.

TITUSVILLE NOVELTY IRON WORKS' APPEAL.

(77 Pennsylvania State, 103. Supreme Court, 1874.)

[1] **Lease, a chattel real—Execution.** A leasehold being a chattel real, by reason of its fixed and permanent character, can, under an execution, be seized and held only as real estate—not as personal goods susceptible of transportation.

Levy—Sheriff's responsibility. No seizure on view is required; the levy is by description. It can not be taken into custody, and the sheriff is no more responsible for it than he is for real estate.

Sufficient levy on leasehold. Under an execution against a lessee a sheriff went upon the leased premises, examined them, etc., and afterward, out of view of them, he indorsed a description of them on his writ, and returned that he had levied on them, as described. *Held,* a good levy.

An inaccurate description of a levy may be explained by oral evidence.

November 11, 1874. Before AGNEW, C. J., SHARSWOOD, WILLIAMS, MERCUR and GORDON, JJ.

Appeal from the Court of Common Pleas of Clarion County. No. 227, of October and November term, 1874. In the distribution of the proceeds of the sheriff's sale of the property of James L. Johnson.

Johnson was the owner of thirteen sixteenths of a leasehold on what was known as the land of "Ditman's heirs," in Richland township, Clarion county. On the 15th of November, 1873, the Titusville Novelty Iron Works issued a *fi. fa.* on a judgment, held by them against him and E. D. Hamilton, for $1,351.

On the same day the sheriff went on the leasehold; stopped at the house on it, in which the defendant Johnson resided;

[1] Purchaser at sheriff's sale takes the lessee's place: *In re Huddell,* 16 Fed. 373.

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he examined the house and oil well on the leasehold, with the intention of levying on it, if he did not get the money, and after looking over the leasehold and inquiring for Johnson, he went to St. Petersburg, about a mile and a half from the leasehold, and then met Johnson; he showed him the writ and told him he wanted the money; Johnson said he could not pay it; the sheriff told him if it was not paid he would have to make a levy. He then levied on the leasehold and indorsed it on the writ that night in St. Petersburg, and not in view of the property.

The sheriff's return to the *fi. fa.*, made November 24th, was as follows:

"By virtue of the within writ, I have levied on all the right, title, interest and claim of the defendants, of, in and to a certain leasehold estate, situate on 'D. Shoup farm,' Richland township, Clarion county, Pa.; lease of six acres, bounded east by public road, southwest and north by D. Shoup farm, together with the oil wells, engines, boilers, engine houses, derricks, walking beams, casting, tubing, rods, tanks and all the machinery and fixtures belonging to said wells and lease; also one frame dwelling house on said lease, one set of drilling tools and one buggy.

"So answers S. JOHNSON, Sheriff."

There was indorsed on the writ also: "See schedule of levy on personal property and writ returned, property not sold for want of time."

On the same day a *venditioni*, reciting the levy, was issued in the same case.

On the same date P. Graham & Co. issued a *fi. fa.* on a judgment in their favor against Johnson.

Previously to the return day of these two writs, the term of the office of the then sheriff, S. Johnson, expired, and the writs went into the hands of his successor, A. H. Beck.

The *venditioni* he returned, "No property found in my bailiwick to answer the within levy."

To Graham's *fi. fa.* he returned:

"By virtue of within writ I have levied on the following property, to-wit: Derrick 20x20 base, 72 feet high; engine and boiler house, 18x24 feet; engine, boiler—twelve horse power; casting, tubing and rods; said leasehold situate

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on lands owned by Ditman's heirs, in Richland township, Clarion county, Pa.; bounded north by Ditman's, east by D. Shoup farm, west by Ditman's and lands leased to Vensel, situated on the southeast corner of said farm; also one house, 18x16 feet, one and a half stories high, on said lease."

He further returned: "December 17th, after due and public notice being given, property cried and sold for $1,820 to John Shoup."

Shoup was one of the firm of P. Graham & Co.

There were a number of other executions on mechanic's liens, etc., issued about the same time. The above mentioned executions had priority of all, except those on the mechanic's liens.

The proceeds of sale were brought into court and referred to David Lawson, Esquire, as auditor, for distribution. Before him the Titusville Novelty Iron Works and P. Graham & Co. were the contesting claimants for the balance of the fund after the payment of the mechanic's liens.

The points of contest were as to the validity of levy under the *fi. fa.* of the Titusville Novelty Iron Works, there having been no actual seizure, and the description of the property levied on being inaccurate.

Sheriff Johnson testified that the property he viewed and levied on was the leasehold of the defendant on the Ditman land, but at the time he made it he supposed it was on the Shoup farm, which adjoined the Ditman land; and he therefore so made out his levy.

J. M. Guffey testified that the leasehold levied on was on the land of the Ditman heirs; the Shoup land lies on the east and south of it, and was the same property described by the sheriff in his levy; that he, as agent of the Novelty Iron Works, gave notice at the sheriff's sale that the property was the same that had been levied on by Sheriff Johnson; that the sheriff cried the sale on the writ of the Novelty Iron Works and named no other writ.

There was other evidence corroborative of the foregoing. It was all objected to as tending to contradict the sheriff's return.

The auditor reported as his opinion that the levy on the writ of the Titusville Novelty Iron Works was not good, the property not being in the view of the sheriff at the time he made the levy.

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He accordingly awarded to P. Graham & Co. the amount of their execution and entirely excluded the execution of the Titusville Novelty Iron Works from any participation in the fund.

After exceptions by the Titusville Novelty Iron Works, the Court of Common Pleas (JENKS, P. J.,) delivered the following opinion in the case:

"We think the conclusion reached by the auditor correct. To constitute a valid levy there must be such interference, either actual or constructive, with the possession of the property of a defendant, as would subject the officer, if not protected by his writ, to an action of trespass. The entry of the levy upon his writ when it, the property, is not taken into his actual possession, must be sufficiently descriptive to furnish reasonable information of its identity. The levy in this case does not meet either of these requirements.

"The exceptions are therefore overruled and report confirmed, and money ordered to be paid out accordingly."

A decree being entered in accordance with this opinion, the Titusville Novelty Iron Works appealed to the Supreme Court and assigned the decree for error.

J. B. KNOX (with whom was J. T. MAFFETT), for appellants.

W. L. CORBETT, for appellees.

Mr. Justice GORDON delivered the opinion of the court, January 4, 1875.

Had the levy in question been of personal chattels, it would have been invalid, for in such case it must be made by actual seizure, or at least in view of the goods.

There is, however, a wide difference between chattels personal and chattels real. The latter grow out of and are attached to the realty, and hence, by reason of their fixed and permanent character, can only be seized and held as realty. A lease of land during the term is as fixed as the land itself, for it can only be used upon the land out of which it arises. It is nothing more or less than a right to use the freehold for the term mentioned in the lease. It is, therefore, an estate in

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land. These chattels can not be seized and held as can personal goods, which accompany the person, and are susceptible of transportation from place to place. The officer in levying upon the latter, is supposed to have them in his immediate personal custody, and he must have them present at the place and on the day of sale. Not so, however, a leasehold estate. *Sowers* v. *Vie*, 2 Harris, 99. The sheriff can have no manual caption thereof; he can not take it into personal custody, and hence, is no more responsible for it than for any other species of real estate. His levy can only be by description of the realty, out of which the leasehold issues. We take it then, that the levy, though not made in view of the premises, was nevertheless good, if it were sufficiently descriptive to indicate the estate levied upon.

The levy is certainly very inaccurate, but as explained by the oral testimony, which was properly admitted, *Hoffman* v. *Danner*, 2 Harris, 25, we are left in no doubt but that the leasehold, from which the money was made, was the same as that described in the said levy on the writ of the appellant.

According to this view of the case the auditor erred in not giving precedence to the writ of the Titusville Novelty Iron Works.

The decree of the court is therefore reversed, and it is ordered that the record be remitted for redistribution, and that the appellees pay the costs of this appeal.

COLUMBIA COAL CO. v. MILLER ET AL.

(78 Pennsylvania State, 246. Supreme Court, 1875.)

[1] **Facts of the case—No breach possible after forfeiture.** Miller, the lessee of a colliery, agreed with plaintiff, a coal company, to sell them all the produce of the mine, etc., they to pay him all mining expenses at stated periods, etc., and if default were made, the lessee might treat the agreement as forfeited. At the same time he mortgaged his leasehold as collateral for the fulfillment of his part of the agreement. After default in payments by the company, and after notice from Miller of his election to declare the contract forfeited, the plaintiff sued on the mortgage, alleging that the lessee had broken his covenants. *Held*,

[1] Party enforcing forfeiture must have fully performed his own covenants: *Steele* v. *Gold Co.*, 1 West C. R. 363.

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that nothing was due on the mortgage, as the agreement had been forfeited for the breach of plaintiff's own covenants.

Idem. Miller had confessed judgment to other persons, and after the breach by plaintiff of its covenants, and notice from Miller of the assuming of the agreement, the leasehold was sold under the judgment. *Held*, that this was not a breach by Miller; the agreement being at an end by reason of the precedent breaches of the plaintiff.

March 1, 1875. Before AGNEW, C. J., SHARSWOOD, WILLIAMS, MERCUR, GORDON and PAXSON, JJ.

Error to the Court of Common Pleas of Schuykill County. No. 331, to January term, 1872.

On the 18th of August, 1868, a *scire facias* was issued by the Columbia Coal Company on the mortgage hereafter mentioned, against August C. Miller and James C. Neil, terretenant.

On the 16th of March, 1869, judgment was entered in it, by confession, by virtue of a warrant of attorney, against the defendants, for $400,000.

On the 15th of February, 1870, the court made a rule to open the judgment absolute, and directed an issue "to ascertain the amount due on the judgment for which execution may issue," the parties to stand plaintiff and defendant in the issue as they did in the *scire facias*.

The facts in the case were as follows:

On the 1st of March, 1866, the plaintiff and August C. Miller entered into an agreement which recited that on the 6th of February, 1863, a lease had been made to Miller of certain coal land in the Shenandoah Valley, Schuylkill county, for fifteen years; that Miller covenanted in the lease to pay rent, for the coal mined at rates specified in the lease; and that there were other stipulations and covenants in the lease, for which reference was made to the lease; that Miller had opened a colliery on the premises and was prepared to mine and send to market from the colliery yearly 50,000 tons of coal and upward. It was then covenanted that Miller should sell and deliver, as was therein specified, to the plaintiff, all the coal not less than 50,000 tons yearly, which should be mined at that colliery during the remaining part of the term, and as much more as the plaintiff might require, to the full

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capacity of the colliery. The fifth clause of the covenant was that Miller, in the most approved and economical manner, would work the colliery to its full capacity, etc., and preserve his lease from forfeiture by his breach or non-performance of its covenants; that the plaintiffs would pay Miller the full cost of mining and preparing the coal for market, including the rent to be paid thereon, the maintenance or removal of the improvements at the mines, and all the covenants of the lease which Miller was bound to keep, and all expenses chargeable to the maintenance and working of the colliery; that there should be transferred to Miller 9,375 shares of the plaintiffs' stock, at $100 per share.

"That on or before the 10th day of each month, estimates of the cost of mining expenses for the last preceding month shall be furnished by said Miller to the Columbia Coal Company, which amount shall then be paid by said company as soon as practicable thereafter; and the said Miller shall then, within five days after his pay day for the said preceding month, furnish to said company a detailed statement, showing the disbursements and payments made by him for the expenses of said preceding month, and the said August C. Miller shall further furnish to said company a daily report of the number of cars loaded or filled at the mines for said company, and shall on or before Wednesday of each week, send the weight scale report of the amount of tonnage sent over regular railroad weigh scales for the preceding week.

"In case the Columbia Coal Company are in default for the period of four consecutive months in the payment of the running and other expenses as aforesaid, the said August C. Miller, his executors or administrators, may sell in the open market, or in such manner as his or their judgment seem best, the coal that may be thereafter mined and taken away from said colliery, until the full amount in arrears as aforesaid, as well as accrued cost of mining coal thus sold shall be fully paid, providing, however, that if the proceeds arising from such sales of coal by the said August C. Miller do not, within the period of four months next ensuing the first period of five months aforesaid, fully reimburse the said August C. Miller for such arrears and accrued cost of mining, then it shall be optional with the said August C. Miller, his executors or

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administrators, to treat the contract as forfeited by the said The Columbia Coal Company, and the said August C. Miller shall be under no further obligations or liability to said The Columbia Coal Company, in respect thereto, or for any payment or payments theretofore made on account of the same."

On the 6th of April, 1866, an agreement was entered into between the plaintiffs of the first part and Miller, M. F. Maize and J. O. Rhoads of the second part. This agreement recited the agreement of March 1, 1866; also, that by a single bill, bearing even date with this agreement, Miller, together with Maize and Rhoads, acknowledged to owe the plaintiffs $400,000; also, that by a coal lease mortgage, bearing even date with this agreement, he had mortgaged his lease to secure the single bill above mentioned, and had also made his warrant of attorney to F. W. Hughes, Esq., etc., to confess judgment on any writ of *scire facias* issued on the mortgage for the full amount of the single bill; it was then agreed that the single bill and mortgage had been given as collateral security for the performance by Miller of the covenants, etc., in the agreement between him and the plaintiffs of March 6, 1866; that no *scire facias* should issue on the mortgage if Miller kept and performed his covenants, etc., in the last mentioned agreement; that if Miller should not keep these covenants, etc., the plaintiffs might at their option forthwith sue out a *scire facias* on the mortgage and proceed at once to obtain judgment thereon, and immediately by virtue of the warrant of attorney above mentioned, judgment might be confessed for $400,000; that before such judgment should be confessed, affidavits of the president, or one of the directors, and the superintendent, general agent or chief clerk of the plaintiffs should be filed in the *scire facias*, setting forth in detail when, wherein, what manner and to what extent any or all of the conditions, covenants and stipulations in said agreement have been broken or violated by August C. Miller, his executors or administrators, and the actual amount of damages and loss occasioned to said company by the violation as aforesaid of said covenants, conditions and stipulations in said agreement; and also that there be filed therewith in said court, proof of service of a copy or copies of said affidavits upon the said August C. Miller, Michael F. Maize and Jacob O. Rhoads, etc.

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"If at any time after judgment confessed, and before a sale of the mortgaged premises under and by virtue of an execution issued thereon, the said August C. Miller, Michael F. Maize and Jacob O. Rhoads, etc., shall pay to said company the amount of actual damages sustained as aforesaid, that thereupon the power of said company to issue an execution on said judgment shall cease until the said company shall subsequently suffer damage and loss by reason of the violation of said agreement, when a new execution may issue upon said judgment upon the filing of affidavits and proof of service as aforesaid, which said last-mentioned execution may be stayed in like manner as aforesaid, and before any subsequent executions shall issue similar affidavits and proof of service must be filed, with power on the part of the said Miller, Maize and Rhoads, or either of them, to stay the same as herein before set forth.

"It is hereby understood that, * * * neither said sum of $400,000, nor any part thereof, shall or may be collected from the said August C. Miller, Jacob O. Rhoads and Michael F. Maize, or either of them, other than from a sale of the premises described in said mortgage, and that upon the sale of the same, said bill single and judgment upon the mortgage shall be considered paid and satisfied."

There was also a separate warrant of attorney dated April 6, 1866, to Mr. Hughes from Miller, reciting the mortgage and authorizing the attorney in any *scire facias*, etc., on the mortgage to appear for Miller and confess judgment against him for $400,000.

After this *scire facias* was issued affidavits were made by the secretary and one of the directors of the plaintiffs, setting forth, as is provided in the agreement of March 1, 1866, breaches by the defendant of the covenants, etc., in the agreement of April 6, 1866, and averring that the plaintiff had sustained actual loss, etc., to the amount of at least $50,000. Thereupon the judgment on which this issue was framed was entered.

The case was tried May 11, 1870, before RYON, P. J.

The plaintiffs and defendant, under numerous objections, gave in evidence the foregoing facts.

Under objection and exception, the defendant gave in evidence judgments entered August 6, 1867, viz.: Hammett &

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Neil against Miller, Son & Rhoads, by confession for $50,000; and same plaintiff against Miller & Maize, for $25,000, by transcript from the District Court of Philadelphia; also *fi. fas.* on these judgments, issued September 3, 1867, under which Miller's leasehold and fixtures were levied on, and sold December 14, 1867, to E. S. Sillyman—the leasehold for $10,000, and the personal property for $1,005.50. The purchase by Sillyman was in trust for himself and other creditors. Neil, the terre-tenant in this case, was afterward substituted as trustee in place of Sillyman.

A. C. Miller, defendant, testified that M. Maize and J. O. Rhoads were partners with him in the lease; the firm name was A. C. Miller & Co. Maize was president of the Columbia Coal Co. The coal was mined in the name of A. C. Miller & Co., placed to the credit of the plaintiffs, and shipped to Miller, Son & Co., Philadelphia. Witness complied with the stipulations of the agreement; mined all that he could under the agreement. The coal mined and shipped did not pay expenses; it was so for about twelve months; at the end of nine months the arrears were about $25,000. The plaintiffs had never paid witness anything under the agreement. Witness demanded money from the president often, none having been furnished; it was in June, 1867, that the arrears were $25,000. He then told the president he would annul the agreement at the end of the eight months. He annulled the agreement in November, 1867.

There was evidence also that defendant had given like notice to the secretary and treasurer and directors in New York, where the principal office of plaintiffs was; and had also forwarded there to them monthly statements of the balances against plaintiffs; also, that part of the expenses claimed by defendant was incurred in sinking additional slopes. There was evidence in rebuttal for the purpose of showing fraud in the sheriff's sale, and that the property had been bought for the benefit of Miller & Co.

There was much other evidence given on the trial. The facts and evidence above given will sufficiently elucidate the questions decided by the Supreme Court.

The court below charged:

"The evidence is that the Columbia Coal Company directed

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the sinking of the slope, and also it is in evidence that this was necessary to comply with the covenants of the lease and to keep the shipments or production of the colliery to the minimum number of tons required by the lease. There is no contradiction in this testimony. It is quite clear to us that under the agreement of March 1, 1866, the slope expenses are embraced, which would show, on the close of December, 1867, a very large balance in favor of Miller, due him by the Columbia Coal Company. This balance started in December, 1866, at $3,505.47, and varied through the year, becoming very large at times, and for December, 1867, it was $25,299.16; more than eight months elapsed successively, and this balance was not paid to Miller, nor has a tender been made. Now, to entitle the plaintiff to recover, it must be shown that the company had complied with the covenants in the agreement of March 1, 1866, or show a reason which would discharge the company from such compliance. This issue is substantially the same as if covenant had been brought by the company against Miller on this agreement of March 1, 1866, and a plea of covenants performed *absque hoc*, etc., etc.

"The company did not comply with the 5th clause of the agreement, as appears from all the evidence in the case. There are other questions in the case which may be equally decisive, but as we think this is sufficient to prevent a recovery, we will not notice the other questions."

The jury found for the defendant.

The plaintiffs took a writ of error and assigned fifteen errors. These raised the questions of fraud on the part of the defendant in relation to the sheriff's sale, the sufficiency of the demand for the expenses and of notice of intention to annul the agreement, and the propriety of the peremptory instructions of the court.

L. BARTHOLOMEW and F. W. HUGHES (with whom was G. E. FARQUHAR) for plaintiffs in error.—Notice to an individual corporator, not lawfully constituted an organ of communication, is not notice to the corporation: *Bank of Pittsburg* v. *Whitehead*, 10 Watts, 402; *Wilson* v. *McCullough*, 11 Harris, 440; *Langolf* v. *Seiberlitch*, 2 Parsons, 64. Even notice to the proper officer is not binding if he acts for himself in

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dealing with the corporation as if he had no official relations with it: Angell and Ames on Corp., Sect. 308; *Winchester* v. *Baltimore Railroad Co.*, 4 Md. 231.

J. W. RYON and J. H. CAMPBELL, for defendant in error

Judgment was entered in the Supreme Court March 8, 1875.

PER CURIAM.

We can not discover what many of the matters assigned for error had to do with the issue tried in this case. The single bill and mortgage were given as a security for the performance of the covenants in the agreement for working the mines. The judgment on the mortgage was confessed under the stipulations in the agreement, and upon affidavits setting forth the breaches alleged. The issue was to determine whether anything was due and owing on the mortgage, and this depended upon the breaches of the covenants assigned. Hence, the real question was whether the defendant, A. C. Miller, had broken his covenants, or any of them, so as to entitle the plaintiffs to judgment, on the security held for their protection. The evidence was clear and beyond dispute, that plaintiffs broke the covenant to be performed on their part, by omitting for more than the stipulated time, to pay the sums they were bound by the agreement to pay to the defendant Miller, which, by the terms of the agreement, gave him the right, "to treat the contract as forfeited." This took place long before the sheriff's sale of Miller's interest and estate in the colliery, and he not only gave notice to Maize, as the president of the Columbia Coal Company, but to the officers in New York, and forwarded monthly statements of the balances against the company.

Under these circumstances the sheriff's sale could not be set up as a breach on the part of Miller, who thus had a right to treat the contract as forfeited by reason of the plaintiffs' precedent breaches, continuing over eight months. And if the plaintiffs relied on the sheriff's sale as a breach, it is not easy to perceive how the fact of collusion, in effecting it, could

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affect the issue being tried. The breach then would consist in the fact of the sale, and not in the means of effecting it. If, by collusion or fraud, the force of the sale was destroyed, it might be argued against the plaintiffs, that there being no legal sale, there was no sufficient breach. But in this issue the sale was not really involved, for the clear and uncontradicted evidence was that the company had not performed its own covenants, and therefore had released the defendant Miller, and enabled him to treat the mining contract as at an end.

Judgment affirmed.

RANDOLPH ET AL. v. HALDEN ET AL.

(44 Iowa, 327. Supreme Court, 1876.)

Custom controlled by contract—[1] Coal pillars. The lessees of a coal mine contracted to leave the mine in good working condition at the termination of the lease. They entered and worked until, as they claimed, the mine was exhausted, except the pillars which had been left for support, and proved a custom to remove such pillars when the coal was exhausted. The roof began to fall in, and a depression on the surface resulted therefrom. *Held*, that as the mine could not be left in good working condition after such removal of the pillars, it would be a violation of their lease, and that the custom proved could not restrict the contract of the parties. That even if the mine was exhausted the consideration of surface injury would be sufficient to sustain the lessor's claim that the mine be left in good working order.

Appeal from Warren Circuit Court, Wednesday, October 18th.

The object of this action is to restrain the defendants, by injunction, from removing certain supports in a coal mine leased by the defendants of the plaintiffs. The circuit court found for the plaintiffs and entered a decree accordingly, and the defendants appeal.

H. MCNEIL, for appellants.

BRYAN & SEEVERS, for appellees.

[1] *Livingston* v. *Moingona Co.*, 49 Iowa, 369; *Post* NEGLIGENCE.

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SELVERS, Ch. J.

The plaintiffs, being the owners of certain lands which were underlaid with coal, leased to the defendants the right to mine coal thereon for the period of five years from March, 1871. The plaintiffs claim that among other terms and conditions of the lease, the defendants were to leave the mine in good working condition at the termination of the lease, and the defendants claim they were to leave the mine in as good condition as was customary among miners. The decided weight of the testimony is in favor of the claim made by the plaintiffs, and under the evidence it sufficiently and satisfactorily appears that defendants were to leave the mine in good working condition at the termination of the lease.

To properly mine coal, certain supports, consisting of wooden posts or props, are required, and also pillars of coal are left at intervals for the purpose of supporting the roof of the mine or the overlying surface. It is customary among miners, when the coal is exhausted, to remove these posts and pillars, or at least the latter, and the defendants, under the claim that the coal was exhausted, commenced to remove these pillars; in consequence or by reason of their so doing, the roof fell in, and there was a depression on the surface of the ground caused thereby.

It is made manifest if the pillars are removed the mine will not be and can not be left in a working condition at the expiration of the lease, and it is also manifest that the removal of the pillars of coal will cause depressions on the surface of the ground.

The grounds upon which defendants seek to justify their right to remove the pillars can be best stated in the language of their counsel, as follows: "The only ground on which plaintiffs can recover, if at all, is that there was a special contract by which defendants were to leave said mine in good working order, whether the coal had been exhausted at the time they quit working or not. We do not think plaintiffs can recover upon their own showing when we take into consideration that the evidence shows conclusively that the coal had all been taken from the bank except the pillars at the time of the commencement of the suit."

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Inasmuch as we have determined there was a special contract that the mine should be left in good working condition, it only remains to consider what effect on such contract has the fact that all the coal, except the pillars, had been exhausted.

There was nothing said at the time the contract was made in relation to the removal of the pillars, nor was the subject of the exhaustion of the coal mentioned or seemingly contemplated by either party. The contract in plain and positive terms required that the mine should at the expiration of the lease be left in good working condition. It will not be in this condition if the pillars are removed. It necessarily follows that to remove the pillars constitutes a breach of the contract; and this result can not be affected or changed by the fact that the coal is exhausted.

If it be admitted that the plaintiffs can have no use for the mine if there is no coal, or if we go a step farther, and admit it is no longer a mine if there is nothing to be mined, yet it was competent for the parties to stipulate that the opening should be left in good working condition, and the plaintiffs have the right to insist that it be so left. Besides this, if the mine is left in good working condition, the surface remains unaffected; but if the pillars are removed the surface will become depressed, and for this reason the plaintiffs have the right to insist the mine shall be left in good working order.

A contract can not be controlled by a custom which the parties have expressly excluded, or which they have excluded by necessary implication, as by providing that a thing which custom affects shall be done in a different way. Where the terms of a contract are plain, custom, even under that very contract, can not be permitted to affect materially the construction to be placed upon it: 2 Parsons on Contracts, 546; *Macomber* v. *Parker*, 13 Pick. 175. A custom can not control the express stipulation of the parties: *Phillips* v. *Starr*, 26 Iowa, 349. The custom of miners to remove the pillars can not be permitted to control the contract, when the effect of allowing such custom to prevail would be to render nugatory express stipulations of the contract. The decree of the circuit court is therefore

Affirmed.

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TROUT v. MCDONALD.

(83 Pennsylvania State, 144. Supreme Court, 1876.)

[1] **Additional openings.** A lease which gives the right to take out all the coal beneath a certain surface confers also the right to make all necessary openings to reach the coal; the lessee is not restricted to a single opening.

[2] **Secret holder of deed confirming lease by receiving rent.** Trout made a voluntary conveyance of a farm to his wife in 1867, but continued in possession till his death, in 1873. Just before his decease he let a lease of the coal to McDonald on a part of the farm. The lessee worked under the lease till the decease and afterward, paying royalty to the widow. The deed was not recorded and the lessee did not know of its existence till 1874. Upon bill filed by the widow to restrain his mining, it was *held*, that she had ratified the lease and was bound by it, without regard to whether she might have avoided the lease upon proper action after her husband's death.

Spring tapped by mining. The fact that a mere "wet weather" spring might be injured by working a mine is not important. Even if a valuable spring, it seems that its destruction, if a necessary incident to mining under a lease, would be *damnum absque injuria*.

Appeal from the Court of Common Pleas of Mercer County, of October and November term, 1876, No. 210.

Margaret J. Trout filed a bill in equity against John McDonald to restrain him from sinking a certain shaft on her land, and from entering thereon for the purpose of mining coal. The facts were as follows:

In December, 1867, M. C. Trout, the husband of the plaintiff, made a voluntary conveyance of a farm of 100 acres of land in Mercer county to his wife. This deed was not recorded till August, 1874, and McDonald, the defendant, never knew of its existence till July of that year. In April, 1873, Trout, by writing under seal, granted McDonald the "privilege of going on the south end of his farm near No. 14 school house, and from thence west to the old barn, and mining and

[1] *Jegon* v. *Vivian*, 8 M. R. 628; *Tiley* v. *Moyers*, 25 Pa. St. 397; *Post* WORKINGS.

[2] *Doe* v. *Crago*, 6 Com. B. 90; *Leitch* v. *Boyington*, 84 Ill. 179.

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taking out all the coal he could reach beneath the surface," for a royalty of thirty cents per ton, and also "to work the mine in such manner as to do the least possible damage to the land, to fill up all holes made, and to level off all banks and ridges," etc. The plaintiff was present at the execution of this lease, and knew the contents of it. Trout died in June, 1873. Up to the time of his death there had been no visible change in the possession of the farm, but the husband remained in possession with his wife till his death, exercising all necessary acts of ownership. The plaintiff did not notify McDonald of her title till July 15, 1874, but on the contrary she allowed him to work under the lease and accepted about $200 from him as royalty thereunder. The defendant had been mining coal through shaft No. 1 under the lease during Trout's lifetime and after his death, and had sunk also a trial shaft, and when this bill was filed was about to open another shaft, No. 3, upon the property described in the lease, to the northeast of the old barn, and distant from the first shaft about 1,000 feet. To restrain the defendant from sinking this shaft, and from entering on her land under the lease, was the object sought by the bill. The bill further alleged probable damage to a spring near shaft No. 3. This spring, however, appeared to be a "wet weather" spring of no particular value.

The court below, MAXWELL, P. J., made a decree dismissing the bill, from which the plaintiff appealed.

MAGOFFIN & TANNER, for the appellant.—McDonald had nothing more than a license to go on the land near the school house, and make a single opening or shaft, and from that to take out coal lying between the school house and barn.

It can not be held that Mrs. Trout ratified the lease, as it was not her act, nor the act of her agent. In *Brown* v. *Bennett*, 25 P. F. Smith, 420, the agreement for the sale was the wife's and the case does not apply.

W. W. MASON, for the appellee.

Mr. Justice PAXSON delivered the opinion of the court January 2, 1877.

There was no clear and distinct finding of the facts by the

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master in this case. So far as they are stated at all it is done argumentatively. This omission has been supplied by the learned judge of the court below, who has found the facts clearly, and as the evidence shows, in the main correctly. We may therefore dismiss without further remark those of the specifications of error that relate to questions of fact. It remains but to inquire whether the conclusions of law arrived at by the learned judge are correct. Passing by the question raised by the first assignment of error as of no possible importance in this case, we have but two prominent questions, viz.: 1. Whether by a fair construction of the lease of M. C. Trout to the appellee the latter was confined to one opening; and 2. Whether the appellant was bound by the lease executed by her husband, and if not, whether she is now estopped by her own acts from denying its validity. By the terms of the lease between M. C. Trout and John McDonald, the appellee, the privilege was granted to the latter "of going on the south end of his (Trout's) farm, near No. 14 school house, and from there west to the old barn, and mining and taking out all the coal he can reach beneath the surface and removing the same from the premises, etc." McDonald was to pay Trout thirty cents per ton for all coal taken out; to work the mine in such manner as to do the least possible damage to the land; to fill up all holes made and level off all banks and ridges, so as to leave the surface smooth and natural. The lessee made an opening near No. 14 school house, and after taking out all the coal he could there mine with profit, made another opening near to, but east of the old barn. It is contended by the appellant that the said opening near the barn was not authorized by the terms of the lease; that said lease contemplated but one opening, and the taking out of so much coal only as could be reached therefrom. The language of the lease is not very clear upon this point, but we think there is enough to show the intent and meaning of the parties. The thing for which the parties were contracting was the coal between certain points. It is a fundamental rule, in the interpretation of a deed or lease, that it is to be taken most strongly against the vendor or lessor. Applying this rule to this lease, it seems clear that it gave the lessee the right to mine all the coal that he could reach beneath the sur-

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face from No. 14 school house west to the old barn. We regard the reference to the school house and barn as merely descriptive of the territory leased and to be mined. There is nothing in the language of the instrument necessarily to restrict the number of slopes or shafts. If we are right in our construction of the lease, that it applied to all the coal between the points referred to, the right to make the necessary openings to reach it would follow by implication, unless restrained by the express words of said lease. It is conceded that as many test holes may be sunk as may be necessary. Why not as many shafts? We do not think that M. C. Trout, were he still living, would have any equity to restrain his lessee from taking out coal from the new slope. Is his wife, the appellant in this case, in any better position? The learned judge of the court below finds as a fact that the deed from M. C. Trout to the appellant was purely voluntary; that it was not recorded until more than a year after his death; that the husband remained in possession up to the time of his death, exercising acts of ownership over the property; that the appellant was present when her husband gave the lease to McDonald, the appellee; that she knew its purpose, and did not then, nor until after the fifteenth of July, 1874, inform the appellee of the existence of her deed, much less make any claim to him for the land described in it. It is said, however, that the answer of the appellee does not deny the title of the appellant. This is true to a certain extent. There is no denial of the execution of the deed from M. C. Trout to his wife. But an adverse title is set up to the extent of the lease, derived from M. C. Trout, executed in the presence of the wife, with her knowledge, and without any objection from her. All this might not estop the appellant from avoiding the lease after discoverture; but we have the further fact expressly found by the court below, that, "subsequent to her husband's death, when a single woman, and before she notified the defendant from sinking said No. 3 shaft or mine, the plaintiff, with full knowledge that the defendant had been mining by virtue of said lease, received from him about $200 royalty to apply on coal so mined." Conceding that the appellant had the right to avoid the lease after her husband's death, here was a deliberate ratification and affirmance of it. It was not done in

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ignorance of her rights. She knew all about the lease, and it would only have been common justice and common honesty to have notified the appellee of her rights at the earliest moment. Instead of doing so she withholds her deed from record for a considerable time after her husband's death; allows the appellee to go on with his improvements for some time before she informs him of her claim, and receives $200 royalty for coal mined under the lease. It was then too late for her to repudiate it. It was competent for her to affirm the lease after her coverture had ceased: *Brown* v. *Bennett*, 25 P. F. Smith, 420.

We do not attach much importance to the matter of the spring. The court below found the fact that it was a mere "wet weather" spring. Were it otherwise, if its destruction was a necessary incident of mining under the lease, it would be *damnum absque injuria.*

The decree is affirmed; the costs of the appeal to be paid by the appellant.

CHAMBERLAIN v. COLLINSON ET AL.

(45 Iowa, 429. Supreme Court, 1877.)

[1] **Receipt of rent ratifies lease.** The receipt of rent by a mining company without objection is a ratification of a lease made on their behalf by a subordinate without authority to make such lease.

[2] **Facts amounting to possession and constructive notice.** A purchaser at execution sale of mineral land has constructive notice of an outstanding lease where the lessee has possession; and he has possession so long as he is working the premises in a miner-like way—working steadily except when prevented by water, and leaving tools in the mine when absent.

[3] **Possession and compromise as affected by threats.** The right to possession of a mine being in dispute plaintiff nevertheless gave defendants permission to work in a certain part thereof. Defendants' right to the possession of the whole was afterward established. *Held*, that this permission, accepted under threats to stop all work, did not affect their right to work the whole of the ground or to establish their right so to do.

[1] *Griffin* v. *Fellows*, 8 M. R. 657; *Trout* v. *McDonald*, 9 M. R. 82.
[2] *Roberts* v. *Wilson*, 4 M. R. 498.
[3] *Stonecifer* v. *Yellow Jacket Co.*, 3 M. R. 4.

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Measure of damages against lessor mining leased ground. A landlord entering upon ground held under lease from his grantor, but without willful wrong or gross neglect on his part, is liable for the value of the mineral he has taken out, less rent and cost of mining; with interest.

Appeal from Dubuque District Court.

The plaintiff avers in his petition, in substance, that he is the owner of the mining right on what is known as the Level Range, through mineral lot 268, in Julien township, Dubuque county, Iowa, and has the exclusive right to work on said range, and dig and take away mineral from the same; that the defendants never had any right to work on said range except along and in the cap rock, and the said right to work in the cap rock they abandoned, and for more than six months ceased all work and labor therein, whereby their right to take mineral out of said cap rock was forfeited; that the defendants have wrongfully taken possession of the whole of said range, and are about to proceed to work it below the cap rock; that said defendants are insolvent, and that the plaintiff will suffer irreparable damage by the acts of the defendants unless they are restrained. The petition prays for an injunction.

The defendants aver that they have the exclusive right to mine in said range; that they have been lessees of such right for more than four years prior to the commencement of the suit; that they worked the same continuously until interrupted by the plaintiff, and expended in labor and materials about $9,000; that after they had discovered large quantities of mineral the plaintiff took possession of the range and took out said mineral. The defendants, by way of cross-petition, ask judgment for the value of the same. Decree for plaintiff.

Defendants appeal.

POLLOCK & SHIELDS, for appellants.

H. B. FOUKE, for appellee.

ADAMS, J.

The defendants claim by lease from the Dubuque Level and Lead Mining Company. The plaintiff claims by purchase

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at an execution sale under a judgment against said company. The defendants claim the right to mine from what is called the graveyard shaft to the Carter pond shaft, a distance of about 1,400 feet.

The plaintiff denies such right, and claims that at most they acquired the right to mine only from the said graveyard shaft to the gin shaft, a distance of about 500 feet.

The first question to be determined is, did the defendants acquire any right from said company, and if so, what was the extent of the same?

Whatever rights were acquired, if any, were acquired through one H. W. Clark, who, previous to the time of the alleged leasing, if not at the time, was foreman of said company in running a water level. He also in many respects seems to have been the superintending agent of the company, but the evidence fails to satisfy us that he was authorized to grant the right to mine said range.

That he undertook to grant such right is clearly proven. The defendant Collinson says: "Charles Stevenson and Clark leased and let me have the Level range exclusively, from the Carter pond shaft to the graveyard shaft." In this he is substantially corroborated by said Stevenson, who, at the time of the transaction, was in the employment of the Level company with Clark. He says: "Clark and I went over to the graveyard shaft and found Collinson there. Clark let Collinson and his associates the privilege of going into the graveyard shaft, and working out the mineral from there to what is known as the Carter pond shaft. * * * The ground let was the Level range, from the graveyard shaft west to the Carter pond shaft. Collinson was to work the whole distance there, anywhere on that ground; no restriction as to place. * * * I consulted with Clark about that, but had nothing to say about it at the shaft; I let Clark do the talking."

It seems to be equally well established that, under the said leasing, Collinson and his associates entered immediately upon and worked the said range, and struck mineral and paid rent to the company, and no objection was made by the company, so far as the record shows.

We must hold, therefore, that Clark's acts, in leasing to the defendants the right to mine in the range, were ratified by the

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company, and that defendant's right extended from the graveyard shaft to the Carter pond shaft, and included the right to mine in the bottom of the drift as well as in the cap rock.

About two years after the defendants commenced mining the interest of the said company in the premises was sold on execution sale to the plaintiff, who had no actual notice of defendant's claim. Whether the defendants had such possession of the premises at that time as was sufficient to impart constructive notice of their claim depends upon whether they had ceased to work the premises in a miner-like way.

On this point the evidence is somewhat conflicting. Collinson says: "I worked that range from the time I got it in the spring of 1868 to the spring of 1873, constantly and continuously, whenever my part of the range could be worked; first with Hurd and John and William Luke, and after Hurd quit, myself and my four boys kept on; when the water got up in the crevice so we could not work, we would sometimes work elsewhere." In this he is corroborated by William Luke, who testified that they always kept possession of the diggings, and that their picks, shovels, bars, tubs, ropes and windlasses, were kept there. John Luke testified that they worked on the range all the time when not prevented by water until the spring of 1873, and had two windlasses all the time at the diggings. This testimony is not, to our mind, overcome. Such possession would constitute constructive notice, and the rights of the miners would be protected under it. The same evidence shows that the defendants did not abandon the premises at any time.

It appears, however, that after the sale to the plaintiff the defendants obtained permission of the plaintiff's agent to work in the cap rock. It is claimed that this fact, if not of itself an abandonment of their right to work in the bottom of the drift, should be regarded as an admission that they had no right to work there. The acts and words of the defendants, in this respect, must be viewed in relation to the circumstances in which they were situated. After the plaintiff bought, one Baxter told the defendant, Collinson, that he had orders to stop him, and that he must take his tools out, and denied that Clark had any authority in the matter. The evidence tends

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to show that the defendants were disturbed by the attempts which were made to stop their work, and while so disturbed they obtained leave from the plaintiff to work in the cap rock.

But if they already had the right, as we hold, to work both in the cap rock and bottom of the drift, that right, we think, was not affected by obtaining plaintiff's consent to work in the cap rock; the occasion of their doing so being that he was threatening to stop their whole work.

The evidence shows that the plaintiff took out 77,880 pounds of mineral worth $40 per thousand, and 2,220 pounds worth $42 per thousand, amounting to $3,248.40. From this should be deducted fifty per cent. for rent, the amount which defendants were paying; also, such other sum as would have been to the defendants the reasonable cost of raising the same. The defendants should have judgment for the balance. Upon the question of cost of raising the mineral there is no satisfactory evidence, and the case must be remanded for the purpose of taking testimony in relation to it.

Reversed.

ON REHEARING.

The defendants claim that this court erred in not allowing interest upon the money due them from the plaintiff, and also in not allowing them the full value of the mineral when raised, less rents.

As to interest, there is nothing said in the opinion, nor was our attention called to it by counsel in the first presentation of the case; but the defendants are entitled to recover as damages the amount set forth in the opinion, and in addition an amount equivalent to interest thereon, to be computed from the time the damages accrued. This was not, we think, when the plaintiff took possession, but when the mineral, which the defendants had a right to mine, was mined and sold by the plaintiff. If the evidence is insufficient, as it appears to us to be, to show fully the different dates from which computation should be made, further testimony should be taken in relation thereto.

Upon the question as to whether there should be deducted from the value of the mineral, when raised, the reasonable cost of raising it, we see no reason to change the views which

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we have already expressed. There are, to be sure, cases in which it has been held that a trespasser can not be allowed compensation for enhancing the value of the property which is the subject of the trespass. In *Stewart* v. *Phelps*, 39 Iowa, 18, the defendant had wrongfully levied upon a crop of corn, and caused it to be husked and cribbed, whereby he enhanced its value, and he claimed that he should be allowed for such enhanced value. DAY, J., said, however, in delivering the opinion of the court: "If the levy was not authorized, and amounted to a wrongful conversion, the defendant became a trespasser, and he is not entitled to compensation for husking and cribbing, notwithstanding those acts may have increased the value of the property"; citing *Baker* v. *Wheeler*, 8 Wend. 505, and *Silsbury* v. *McCoon*, 3 N. Y. 379.

But in the case at bar the mineral raised by the plaintiff was taken from his own ground. He is not seeking an allowance for value added by him to the defendants' property. The defendants are seeking to recover, not the mineral, but damages. Now, the damages which they have sustained arose from the fact of their being deprived of the full benefit of their lease. They have been prevented from mining mineral which they had a right to mine. The question then is, what is the value of the right of which they have been deprived? It is, evidently, the value of the mineral unmined, or, what is the same thing, the value of it mined less the reasonable cost of mining it. It was so held in *Stockbridge Iron Co.* v. *Cone Iron Works*, 102 Mass. 80, and in *Maye* v. *Yappen*, 23 Cal. 306. In *Forsyth* v. *Wells*, 41 Penn. St. 291, it was held that the measure of damages was the value of the ore in the ground, but the rule was qualified by the condition that the defendant is not guilty of a willful wrong or gross neglect. In the case at bar we think that Chamberlain was not guilty of a willful wrong or gross neglect. Whatever rights the defendants acquired in the range, so far as mining in the bottom of the range was concerned, were acquired from the Dubuque Level and Lead Mining Co., from whom the plaintiff derived title. They had only a verbal lease, and the evidence in regard to it was conflicting.

After the rehearing was granted upon the defendants' petition, the plaintiff applied for a rehearing. He claims that re-

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ceipt of rent by the plaintiff should not be regarded as a ratification of the leasing, because it does not appear that the plaintiff received the rent "with full knowledge of the portion of the range from which the mineral was raised."

The ratification, as we hold, took place by reason of the receipt of rent by the company from whom the plaintiff's title was derived. As to whether the company knew from what portion of the range the mineral was raised, does not appear, nor do we think it material. The evidence shows that the defendants expended a large amount of money and labor in its mining in various parts of the range, and in reaching and uncovering the very mineral in controversy. In expending the labor and money, we think that they were justified in doing so upon the assumption, from the time that the company began to receive rent, that Clark was authorized to make the contract under which the rent was paid.

The petition for a rehearing on the part of the plaintiff must be overruled. The opinion will be adhered to, with the modification necessary to correct the oversight in regard to the allowance of interest as a part of the damages.

APPEAL OF C. G. CHRISTIE AND R. P. SCOTT.

(85 Pennsylvania State, 463. Supreme Court, 1877.

Forfeiture for default in payments. The owner of a leasehold interest in an oil well, with its machinery, etc., sublet it to D. for ten months with privilege of purchase—payment to be made in installments. If default were made in any of the payments, the payments already made were to be treated as liquidated damages. D. went into possession and made but one payment. Afterward the property was levied upon and sold by an execution, creditor of D. *Held*, that there was no title in D. to pass by the sale, by reason of his default in the further payments.

[1] **Essentiality of time.** The necessity of stringent provisions as to time in contracts concerning oil property recognized.

Chattels real. The case of *Martin* v. *Mathiot*, 14 S. & R. 214, distinguished, the property in that case consisting of chattels personal and in this of chattels real.

[1] *Twin Lick Oil Co.* v. *Marbury*, 3 M. R. 689.

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Appeal from the decree of the Court of Common Pleas of Butler County, of October and November term, 1876, No. 226.

After the bill in equity and answer were filed in this case, it was agreed to submit the whole case as stated in the bill and the title to the property, to the court, without the intervention of a jury, with the right of either party to take testimony. The bill was filed by Edward Bailey against the appellants, and averred that on February 17, 1876, plaintiff purchased from one R. L. Carlin a certain leasehold, containing about five acres of land situate in Butler county, together with machinery, etc., and an oil well known as the "Emery and Caldwell" well, for $1,900 in cash, and received on that day from the vendor possession of the property so purchased; that on February 18, 1876, plaintiff was arrested, at the instance of defendant Christie, for forcible entry and detainer, and at the time of the arrest defendant Scott took possession of the property; that on February 2, 1876, defendant Christie purchased at a sheriff's sale, for $50, all the right and title of one Cranmer of, in and to the said property; that all the right that he (Cranmer) had was under certain articles of agreement dated December 10, 1875, in which said Carlin, in consideration of one dollar, leased for ten months to said Cranmer the said five acres, well and fixtures, etc.; $200 were to be paid at the time of the execution of the lease, $500 in two months from its date, $500 in four months, $500 in six months, $500 in eight months and $175 in ten months. Upon the payment of the aggregate of said sums of money, Carlin agreed to execute to Cranmer a bill of sale of said property. It was agreed that upon a failure to pay at the times specified all the right of Cranmer in the property should cease and determine, and that all payments previously made should be considered as liquidated damages. It was agreed that until the whole amount was paid the title should remain in Carlin. It was averred that at the sheriff's sale due notice was given of the right of Cranmer; that he made but one payment on the said contract, to wit, $200, and that Carlin, on February 15, 1876, under the lien of the contract took possession of the property, and on February 17, 1876, sold and delivered the property to plaintiff. The bill prays for an injunction and general relief.

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The answer of the defendants set forth that February 2, 1876, they bought at sheriff's sale all the right and title of Cranmer in and to said property; that before and at the time of the levy Cranmer was in quiet possession of the premises, claiming to have purchased them from Carlin; that the attorney of Carlin had, on the notes given for the amount of the purchase money, entered judgment against Cranmer in the aggregate for the whole purchase money, except the $200 paid in cash, which judgments are unsatisfied; that Carlin did not give plaintiff quiet possession of the property, and that he knew of defendants' purchase and title; that the purchase by plaintiff is a fraudulent scheme; that the said Cranmer contract was a fraud upon his creditors as he went into possession; that defendant took a good title by the sheriff's sale. The quiet possession of plaintiff is denied.

The court made a decree that the title to the leasehold and property was in plaintiff, and that defendant should deliver to him possession of the same.

Defendants appealed from this decree, and assigned for error the making and entering of this decree.

THOMPSON & SCOTT, for appellants.—The contract of Carlin with Cranmer was a conditional if not an absolute sale. Cranmer gave five judgment notes in payment, went into possession and had absolute control of the premises. Carlin did not put his contract on record but entered up his judgment notes, and by his conduct strengthened the impression that Cranmer was the owner. This rendered the contract fraudulent as to the creditors of Cranmer, and the sheriff's vendee at the sale took a good title: *Martin* v. *Mathiot*, 14 S. & R. 214; *Becker* v. *Smith*, 9 P. F. Smith, 469; *Rose* v. *Story*, 1 Barr, 190; *Welsh* v. *Bell*, 8 Casey, 12; *Waldron* v. *Haupt*, 2 P. F. Smith, 408. There was a remedy at law: *Tillmes* v. *Marsh*, 17 Id. 507; *North Pennsylvania Co.* v. *Snowden*, 6 Wright, 488.

JOHN H. MILLER, for appellee.—Carlin did not part with possession, but retained control. His contract was not a sale: *Rowe* v. *Sharp*, 1 P. F. Smith, 26.

Mr. Justice GORDON delivered the opinion of the court, January 7, 1878.

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This was a bill to recover the possession of, and settle the title to a certain leasehold estate in the county of Butler. The court decreed the right of possession and title to be in Edward Bailey, the plaintiff below. Undoubtedly the bill was misconceived, for the court had no jurisdiction to try an action of ejectment in this form; as, however, this objection was waived and the whole matter was by agreement of the parties submitted to the court, we must treat it as a regular case stated.

R. L. Carlin, under whom the plaintliff claims, was the owner of a certain leasehold property of about five acres in Fairview township, on which was an oil well with the necessary machinery and appurtenances. Carlin leased this property on the 10th of December, 1875, to David Cranmer, for the term of ten months. Cranmer paid thereon on hand $200, and agreed to pay within the said ten months, in several payments, the further sum of $2,175, and upon the last payment Carlin agreed to execute to Cranmer a bill of sale for the premises.

It was further agreed that in case Cranmer failed to meet said payments or either of them, as they fell due, his right in and possession of said premises should at once cease and determine and revest in Carlin; that any payments made prior to such default should belong to the lessor as liquidated damages, and that until payment was fully made the property should continue to be the property of Carlin, and that the oil produced from the well should be run in his name, the proceeds to be applied by him on account of rent. Cranmer went into possession but made no further payment.

On the 2d of February, 1876, this property was sold by the sheriff of Butler county, as the property of Cranmer, on a *fi. fa.*, at the suit of K. McCandless, to C. G. Christie, one of the defendants below.

Now there is no doubt of the fairness and rectitude of this transaction as between the parties themselves. The agreement was one they had a right to make, and one that must be taken and construed according to their own intent and meaning. It was a lease for the term of ten months, with condition for a sale absolute at the end of that time, provided the payments as therein specified should be promptly met and discharged, the products of the well, in the meantime, belonging to the lessor. The payments were not met, hence resulted a

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forfeiture of Cranmer's rights and a revestment of the same in Carlin. This, in ordinary cases, might be regarded as a sharp and hard contract, but it is in fact not any more so than any other contract in which time is made of essence; and we can readily understand how necessary stringent provisions are in the transactions of so uncertain a business as oil mining. Had there been any attempt to fulfill the conditions of this contract—had there been a tender of the payments due, the matter would present itself in a more favorable light for the defendants; but as the attempt is to get Carlin's property without consideration, it can not reasonably be expected that we will regard such attempt with much favor.

As there is no question of notice involved in this case, we can not see how the sheriff's vendee occupies a standing more favorable than Cranmer himself. It is true there has been an attempt to bring this transaction within that class of cases represented by *Martin* v. *Mathiot*, 14 S. & R. 214, but this is a failure. We well know that in a sale of personal chattels the vendor as against creditor can not retain title thereto, after a surrender to the vendee, but such is not the case with chattels real. If one has a lease of a farm for twenty years it will not do to say that he loses title thereto by putting a tenant into possession under a lease for ten years. As was said in the case of the appeal of the Titusville Novelty Iron Works, 27 P. F. Smith, 103, there is a wide difference between chattels personal and chattels real. The latter grow out of, and are attached to the realty, and by reason of their fixed and permanent character, can only be seized and held as a realty. A lease of land during the term is as fixed as the land itself, for it can only be used upon the land out of which it arises. It is nothing more or less than a right to use the freehold for the term mentioned in the lease. It is therefore an estate in land. These chattels can not be seized and held as personal goods which accompany the person, and are susceptible of transportation from place to place.

It is thus apparent that the defendants have failed to raise a case of legal fraud and they must stand or fall in the rights of Cranmer. As, however, these have failed through a want of compliance with the conditions on which they were founded, the case is remediless.

Decree affirmed.

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[1] HARLOW v. THE LAKE SUPERIOR IRON COMPANY.

(36 Michigan, 105. Supreme Court, 1877.)

Lessee may not open new mine. A lessee of lands for years is entitled to work an open mine upon the premises unless restricted by the terms of his lease; but he has no right to open a new mine unless this privilege be expressly granted.

[2] **Narrow construction not favored.** In construing a lease it is contrary to well settled rules to give it a narrow and technical interpretation based upon some particular word or clause; the intent must be gathered from an examination of the instrument as a whole, and all clauses made consistent if possible.

The special lease in question in this cause *construed* to be, not a lease of the lands with the privilege of mining, or a lease of the lands together with the minerals, but a grant of a specific mining privilege, particularly set forth in the lease, excluding all other uses except as incident to the mining rights granted.

[3] **The reservation of the agricultural use** to the lessor of all premises not needed for mining purposes, is inconsistent with an intent to grant an ordinary leasehold interest.

[4] **Indefinite mining right will not sustain ejectment.** Under a lease granting an undivided interest or right to enter upon the premises, to open such mines as the lessee might see proper, to take wood and to erect buildings needful for the business, the right of the lessee in the premises until actual possession of some part thereof has been taken, is floating and indefinite; a mere incorporeal right which is not capable of enforcement by an action of ejectment.

Idem--Privilege of purchase. The privilege of purchase of the lessor's entire interest and the privilege of seeking partition: *Held*, not inconsistent with the above construction.

Indivisible privilege. The right leased, being that of an undivided half, gave the lessee the right to prospect over the entire lands and open and work as many mines as he deemed proper; this entire right he could assign or convey, but he could not carve it up and parcel it out into several distinct rights, to be held and operated by more than one person, company or corporation; his right being a single one could not be subdivided, and a similar undivided right remain vested in the lessor.

Error to Marquette Circuit.

The action was ejectment and turned upon the construction of the following instrument:

[1] S. C. on second appeal, 8 M. R. 285.
[2] *Watson* v. *O'Hern*, 8 M. R. 333.
[3] *Raine* v. *Alderson*, 4 Bing. N. C. 702.
[4] *Carnahan* v. *Brown*, 5 M. R. 193.

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"Know all men by these presents, that whereas I, Isaiah Briggs, of Marquette county, State of Michigan, have this day obtained a pre-emption to, and have paid the full consideration to the receiver of the land office at Sault Ste. Marie, for the quarter section of land lying in Marquette county and State of Michigan, known and described as the southwest quarter of section ten (10), in township forty-seven (47), north, of range twenty-seven (27), west, to which a full title will be perfected: Now, in consideration of five hundred dollars, to me paid by Robert J. Graveraet, of Marquette county and State aforesaid, receipt whereof is hereby confessed, I do hereby let and lease to said Robert J. Graveraet, his heirs or assigns, the equal undivided one half part of said southwest quarter of said section ten (10), in said township and range, for the full end and term of ninety-nine years from and after the date of these presents, fully to be complete and ended, for all the purposes of mining of iron ore and other minerals, and for all the business of said mining, obtaining ore, roasting the same, obtaining wood for said purposes, erecting and maintaining buildings suitable and needed for said business and calling, and for all purposes of making the mining interest on said land productive and profitable, and granting to said party the right to appropriate to his own sole use and benefit all ores and minerals procured from said land during the term of said lease; and, further, I hereby agree and bind myself not to sell, assign or incumber said undivided interest hereby leased, unless said Graveraet, his heirs or assigns, shall have the first refusal to purchase said undivided one half; or if said quarter section be divided, then that said Graveraet, his heirs or assigns, shall have the first refusal to purchase said divided half on terms to be agreed on between the said parties or their representatives; and said Graveraet shall, on notice to said Briggs, have the right to have said land so divided, or to purchase the same as undivided at any time within this lease, by consent of said Briggs; and in case said parties can not agree to a division, the price and terms of purchase, then each party shall select one disinterested person, and these two appraisers select a third, who shall decide as to a division or purchase, or both; and the award of such appraisers shall bind the respective parties. It is, however, expressly understood that said Briggs retains the

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use of this land until sold to said Graveraet for agricultural purposes, saving what is needed for mining purposes as above written; and for a description to said quarter section it is known and described as "fractional quarter section;" and further, this lease is only operative after a confirmation of said pre-emption claim, and said Graveraet is to pay one third of all taxes to be laid on said fractional quarter section during the term of said lease. This lease binds the heirs, administrators, executors and assigns of the respective parties.

"Signed and sealed at Sault Ste. Marie, this twenty-eighth day of September, A. D. 1850."

F. O. CLARK, BALL & OWEN, DANIEL GOODWIN and JOHN VAN ARMAN, for plaintiff in error.

W. P. HEALY, G. V. N. LOTHROP, C. I. WALKER and J. J. STORROW, for defendant in error.

MARSTON, J.

Plaintiff in error, claiming to be owner of an undivided one fourth leasehold interest, for ninety-nine years from and after September 28, 1850, in the southwest quarter of section ten, township forty-seven, north, of range twenty-seven, west, in 1875 brought an action of ejectment to recover possession thereof.

Upon the trial, to maintain the action, he introduced in evidence:

First. A certified transcript of articles of incorporation, dated February 21, 1853, whereby the defendant became a body corporate.

Second. Original articles of copartnership of the Marquette Iron Company.

Third. A copy of a patent, dated December 1, 1851, of the lands in question, from the United States to Isaiah Briggs.

He also introduced certified copies from the records of the following instruments:

Fourth. A lease from Isaiah Briggs to Robert J. Graveraet;

Fifth. An assignment of the same by Graveraet to the Marquette Iron Company, and

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Sixth. A deed from said Graveraet to Amos R. Harlow and Waterman A. Fisher, whereby said Graveraet did "recede and retire" from the partnership known as the Marquette Iron Company, and did thereby yield, quit-claim and forever release to said Fisher and Harlow all rights, claims and titles, legal or equitable, to the property and effects, both real and personal, of said company, excepting certain property not affecting the lands in question.

The plaintiff further introduced evidence tending to prove that he took possession of the property in question in February, 1857, and erected a log house thereon, and remained in possession thereof about six weeks; that on returning to the premises in October following he found the defendant in possession, and that his right therein was disputed. It also appeared that Edward Clarke died in August, 1849. Having rested, the defendant's counsel moved the court to strike out and exclude from the evidence introduced:

First. The lease from Briggs to Graveraet;

Second. The assignment thereof to the Marquette Iron Company;

Third. The deed from Graveraet to Harlow and Fisher of the partnership assets of the Marquette Iron Company; because,

First. They were not admissible under the declarations;

Second. The assignment was void and could vest no title in the Marquette Iron Company, said company being a co-partnership and not a corporation, and

Third. If any interest was vested in the plaintiff it was as a partner; and it not appearing that the affairs of the partnership had been settled, plaintiff could not maintain ejectment thereon.

The motion was granted, and no other evidence having been introduced, the court directed the jury to return a verdict for the defendant, to all of which counsel for plaintiff excepted. A verdict and judgment having been rendered for the defendant, the plaintiff brings the case here for review upon writ of error.

The copartnership known as the Marquette Iron Company, when formed, was composed of Waterman A. Fisher, Edward Clarke, Amos R. Harlow, and Robert J. Graveraet. Clarke died in 1849, and Graveraet withdrew therefrom in August,

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1852. While it appears from the record that the Marquette Iron Company did carry on business for some time after its formation, it does not appear that anything was done by it, under the Briggs lease, upon the lands in dispute. A number of questions growing out of the relations of the plaintiff with the Marquette Iron Company, similar to those raised in the court below, were elaborately discussed upon the argument. We do not, however, deem it necessary to consider them, as the view we take of this case upon a construction of the lease is, we think, decisive of the present action.

Conceding, for the purposes of the present case, that the plaintiff has shown in himself an undivided one fourth interest under the lease, and his right to maintain an action of ejectment therefor, which, to say the least, is very doubtful, let us turn to that instrument, and ascertain from it, examined as a whole and in the light of the circumstances existing and known to the parties at the time of its execution, what rights the lessee acquired thereunder. A copy of the lease is given in the margin (page 48). It is not claimed that the rights then granted have since, either by construction of the parties, possession of the premises thereunder, or otherwise, been enlarged, although the plaintiff's interest therein may have been increased by the death of Clarke and the deed from Graveraet.

It is unnecessary to attempt to define or even to discuss in this case all the rights which a lessee of wild lands would have in this State. We may, however, for the purposes of this case, consider the law as settled, giving to a lessee of lands for years the right to work an open mine upon the premises, unless restricted by the terms of his lease, and it is also equally well settled that he would not have the right to open a new mine, unless the right so to do was expressly granted. Such, it is said, are the general rights of lessees of lands in which there are minerals: 1 Wash. 412.

It is not claimed that there was an open mine upon the premises in dispute at the time the lease was executed, and while one of the chief objects in view, if not the only one, was to grant on the one part and acquire on the other, certain mineral rights, defendant insists that but a mere right to enter, search for, dig and raise minerals with the right of ownership of the minerals thus raised was granted, and that

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for such a right ejectment will not lie. The plaintiff claims that the lease from Briggs to Graveraet was intended to, and did lease an undivided one half of the land itself for the period therein mentioned and for the purpose therein stated.

It would not only be unjust, but contrary to the well settled rules of construction to dispose of this case upon any narrow or technical view, based upon any particular word or clause in the lease. When we examine the entire instrument as a whole, we think there is no difficulty in arriving at a correct conclusion, one that will be in entire accord with the intention of the parties making it, in harmony with the surrounding circumstances then existing, and consistent with each and all the various provisions of the instrument itself. And while a consideration of some particular part, if standing alone, might point to a certain definite result, yet we must still recognize the fact that any such clause may be controlled by the connections in which it is used, or by other parts of the same instrument; and that the legal construction or conclusion arising from the entire instrument may be entirely different from, or even contrary to, and at variance with, the conclusion which a part standing alone would seem to indicate.

The instrument at the outset purports to be a lease of the undivided one half part of a certain description of land, and if it had gone no further it is not at all likely that any question could have arisen thereon. This clause is, however, we think, controlled and limited by what follows. It is not a lease of the lands, with the privilege of mining thereon, or together with the ore and minerals to be found upon said lands, nor are there any words contained therein, indicating that this first clause is to be in any way added to, extended or enlarged by what follows, or that any additional right is intended to be conferred and added thereto. That other rights, rights which the law would not have implied, viz., to open mines and work them for the lessee's sole benefit, are granted, is clear, but they are not in the nature of additional rights and privileges, but are placed there to limit and define the nature and extent of the clause immediately preceding, and of which they form a part.

When the right is thus defined in the lease, it is no longer a lease of the land to be used by the lessee for such purposes

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within the limits allowed by law as he might deem proper, but to be used for a particular specific purpose, so far as might be necessary to the successful accomplishment of that purpose, and for none other. A specific purpose having been thus set forth in the lease, excludes all others which the lessee might otherwise have been entitled to. This mining privilege might of course have been so expressed in the lease as to indicate clearly an intention to confer the same in addition to any and all other rights which the lessee, even without such a clause, would have had; but the language used in this instrument will not authorize any such enlarged construction. Had the lessee or his assignees entered into actual possession of the lands described in this lease, and upon examination ascertained that the mining interest thereon could not be made productive and profitable, and for that or any other reason have concluded not to engage in the business of mining thereon, could they have retained possession of the lands for any other purpose? Could they have taken any of the wood upon said lands and used it except in connection with the mining interests thereon? Could they have erected and maintained buildings thereon for any other purposes? In a word, could they have enjoyed any of the rights and privileges usually enjoyed by lessees under a lease of lands, in case they did not engage in and carry on the business of mining thereon? And if they did engage in and carry on the business of mining thereon, were not the purposes for which such lands could be used confined to such as would make the mining interests on said lands productive and profitable? They had no right to a use of the land for any purpose except as an incident to the mining right granted. While engaged in mining, the lessees could use so much of the land as would be necessary for that purpose, but they could use it for no other. In case the mining business proved unprofitable and was abandoned or not carried on, then they were not entitled to the possession or use of the land for any purpose. In other words, if plaintiff's claim is correct, that the lease was one of lands, with the right of mining in addition thereto, then the result would be that they had a lease of lands without any of the usual rights or incidents pertaining thereto; they had a grant of land so limited as to make the grant itself of no effect, while the additional or mining right

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gave them, as a necessary incident, certain rights in the land. The additional privilege of mining gave them all their rights in the land, while the lease of the land itself gave them no rights whatever therein. It is almost needless to say that we can not adopt the theory of the plaintiff.

The interest or right leased was an undivided one, and gave the lessee the right to prospect upon any part of the lands, and open and work such mines as he might deem proper, with the further right to appropriate to his sole use and benefit all ores and minerals procured by him. He had also the right to obtain wood for said purposes, to erect and maintain buildings suitable and needful for the business. All these rights were expressly granted, and that the rights thus granted might be fully enjoyed, all necessary privileges in the land would pass as incident thereto.

What, then, is the extent of the lessee's interest in the land itself under such a lease? This must be determined from the extent of his mining operations. If he opened one or more mines and erected buildings suitable and needed for the business, it would seem that for such purpose at least, and perhaps others in connection therewith, he would be entitled to the exclusive possession of portions of the soil, and that an undivided half interest would not be sufficient for such purpose. And if it appeared in this case that the lessee or his assignees had entered upon the land, opened mines, erected buildings, and in other ways taken actual possession of some definite parcel or parcels of the land, from which they had been ousted, and had brought their action to recover possession thereof, a different question would have been presented. But until actual possession of some part of the land is taken, their right therein is floating and indefinite; it is a mere incorporeal right which is not capable of enforcement by an action of ejectment: 3 Blackstone, 206; Tyler on Eject., 41, and cases cited.

There are other provisions in this lease strongly corroborative of this view. The lessor expressly retains the use of all this land for agricultural purposes, "saving what is needed for mining purposes." There is nothing in the case tending to show that either now or at the time this lease was executed, these lands were capable of or could be used for any purpose other than mining or agricultural purposes. Even if they

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were, the fact that the lessor retains, for the entire term, their use for agricultural purposes, which would necessarily exclude their use by the lessee for any purpose except mining, shows that the lessee's interest in the land was a mere incidental one, dependent upon the mining right; and the clause relating to taxation favors the same view. It is, however, insisted by the plaintiff that the provisions in the lease by which the lessor agrees not to sell, assign or incumber "said undivided interest hereby leased," unless the lessee or his assigns shall have the first refusal to purchase the same, or, "if said quarter section be divided, then that said Graveraet, his heirs or assigns, shall have the first refusal to purchase said divided half," and also giving Graveraet the right to have the land divided, are all inconsistent with any view other than the one taken by the plaintiff. We see nothing in these several provisions inconsistent with the view we have taken, and the nature and extent of the interest leased called for the insertion of some such provisions in the lease to prevent disputes thereafter. At the time this lease was executed, it was undoubtedly supposed that the lands described therein were valuable for mining purposes, but whether mining thereon would prove a profitable investment or not was something that could not be determined. Even if rich in minerals, large sums of money must be expended in prospecting, opening mines and developing its mineral resources. If it proved profitable, the lessee would be anxious to have his tenure enlarged, and rather than have an incumbrance placed upon the property, they provided that the lessee should first have the privilege of purchasing.

The right leased was that of an undivided one half. This would give the lessee the right to prospect over the entire lands, and open and work as many mines as he might have thought proper. This right he could undoubtedly have assigned or conveyed to a co-partnership or corporation, giving it the same right. But he could not, we think, have cut and carved it into several distinct and separate rights, to be held and operated by more than one person, company or corporation. It was, we think, a single right, and could not be subdivided, although it might be owned and operated by a single body composed of several individuals: *Caldwell* v. *Fulton*, 31 Penn. St. 476. Now the right granted by the lease being an

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undivided one half, a similar right remained in the lessor. He or his assignees or grantees could also open and work mines upon this same property. And it is highly probable, that if mining upon the property proved profitable, a conflict might arise between two individuals, companies or corporations, each owning an undivided half, with the right in each to appropriate to its sole use and benefit all ores and minerals it might procure from said land, and that a division to prevent such a conflict would be necessary. It was but reasonable, therefore, and a wise forethought, to provide for a division of their rights, or even for a division and sale of the lands; and that in case of a contemplated sale, incumbrance, or division by the lessor, that the lessee should have the first privilege of purchasing. Such provisions are not inconsistent with, and could not enlarge, the previous provisions of the grant.

That a right such as the one here granted is not exclusive, and does not preclude the lessor from exercising or granting a like right to others, see *Chetham* v. *Williamson*, 4 East, 476; *Stockbridge Co.* v. *Hudson Co.*, 107 Mass. 322; *Union Petr. Co.* v. *Bliven Petr. Co.*, 72 Penn. St. 173.

Looking, then, at the apparent intention of the parties as collected from the whole context of this lease, and at what was done under it, we are of opinion that the lessee acquired no such interest in the land as would enable him or his assignees to maintain an action of ejectment for any particular part thereof or interest therein, and that the court did not err in striking out and excluding from the evidence the lease and assignment thereof, and instructing the jury to find a verdict for the defendant. Upon the other questions we express no opinion.

The judgment must be affirmed, with costs, and the record remanded for further proceedings under the statute.

The other justices concurred.

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FRECK V. THE LOCUST MOUNTAIN COAL AND IRON CO.

(86 Pennsylvania State, 318. Supreme Court, 1878.)

In what case duty of lessor to fix boundary. Where a party is the lessor of two adjoining mines, the rule governing adjacent mines when held by different owners, that the lessee must ascertain the dividing line at his peril, does not apply; for the lessor having the power to protect himself by covenant, if he neglects to do so, can not plead rules resulting *ex necessitate rei* as against his own grant.

Lessee passing bounds by mistake—Measure of damages. Where the lessor not only gives his tenant the power, but makes it his duty to explore and mark a theoretical line upon his own premises, the tenant can not be treated as a trespasser if, in an honest attempt to ascertain the line, he should chance to pass over it; for the right to do what is necessary in order to find and fix the line, is implied in the grant by which it is made a boundary, and in such a case the lessor can only recover damages for improper mining or criminal negligence.

Error to the Court of Common Pleas, No. 2, of Philadelphia County.

Action on the case, by the Locust Mountain Coal Company, against Joseph M. Freck.

Plaintiff owned two adjoining coal tracts in Columbia county, called respectively Centralia and Hazeldell. The first it leased in 1862 to defendant for a term of ten years, and the other to Robert Gorrell & Co. The defendant in his lease was given the right "to dig, mine and take away coal, as their own property, from the veins of coal above and below the water level, as hereinafter limited and described, viz.: All the coal in the south dipping vein, known as the Mammoth vein, in the Centralia or Centreville basin, in the county of Columbia and State aforesaid, beginning at the east line of the lands of the party of the first part, and following the vein westward one mile and one third of a mile; also all the coal in all other south dipping veins, in said Centralia basin, within the limits of the run hereinbefore named,

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which the parties of the second part shall cut by tunnel, and work on or before the 1st day of January, 1866." For this privilege Freck was to pay plaintiff a royalty of twenty-five cents per ton. Gorrell & Co. had a similar lease of all the coal in the "north dipping vein," the royalty reserved being thirty-five cents per ton.

The veins form what is called a basin, oblong in shape, many miles in length, the north and south sides sloping to the bottom, something like the letter V, and drawing together at the eastern and western ends of the basin, in a formation something like the end of the bowl of a spoon. The coal lies between thick seams or layers of slate, like the leaves of a book between the covers of it. The covers represent the slate. That part of the vein, or side of the basin, which inclines or dips to the north, is called the "north dip," and the other side of the basin, or part of the vein which inclines to the south, is called the "south dip." The lowest point, where the two dips meet, is called the synclinal axis.

The controversy in this case arises from the interference of the mines worked, on the north and south dips of the Mammoth vein, near the synclinal axis.

This axis formed the boundary line between the respective tracts leased by Gorrel and defendant, and this action was brought for damages resulting from the trespasses of Freck, who, it was alleged, had crossed this line with his gangway during the course of his mining. It was shown that Freck had crossed this axis, his gangway being lower than that of Gorrel, and the water from the mine of the latter flowed into the Centralia, and that, by reason thereof, the plaintiff was compelled to incur large additional expense for machinery and pumping. It was also in evidence that Freck had mined seven thousand tons of coal out of Hazeldell, upon which the additional royalty of ten cents per ton was claimed, and for which, it seemed, he paid. There was considerable evidence, on the part of defendant, to show the difficulty of ascertaining the true location of the synclinal axis until it had been reached by working the mines; and plans were offered in evidence showing that the plaintiff's own engineers were not positive as to its true location. He also gave evidence to show that the damages complained of could have been avoided, if Gorrell

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had raised the grade of his gangway, or carried off the water by means of troughs. By the terms of the lease, the plaintiff reserved full power to supervise the work, under the inspection of its own engineers, and in pursuance thereof, its engineer, Mr. Stockett, had at various times entered and inspected the operations of Freck, and on the 22d of April, 1871, sent him the following notice:

"Office Locust Mountain Coal & Iron Co.,
Centralia, April 21, 1871.

Gentlemen:

A part of the breasts turned on the south side of your east gangway of 2d lift on the Mammoth Vein, is beyond the limits of your lease, and consequently within the limits of another lease. The object of this notice is to prevent any infringement on the rights granted to the lessees.

Yours respectfully,
THOMAS R. STOCKETT, Eng. and Agt.

Messrs. J. M. Freck & Co.,
Lessees of Centralia Colliery."

On the same day Mr. Stockett wrote to the president of the Locust Mountain Company, detailing a conversation he had had with Freck and his mining-boss, Williams, wherein they had expressed their confidence that there was yet another south dip between the breasts referred to and the adjoining lease of Gorrell & Co., and stating his own opinion that whilst this was possible it was not probable. It did not appear that there was any remonstrance or caution against Freck proceeding with any experiment to discover this other "south dip." The junction of the two mines was first made by Gorrell & Co. after Freck had passed the boundary line. At this time the gangway of Gorrell & Co. was lower than that of Freck, yet, instead of making the grades conform, they drove it still lower.

At the trial, the plaintiff having proved that Gorrell, in driving his gangway in the Hazeldell colliery, broke into the breast of the Centralia, and that the interference of the gangways produced a necessary peril, the counsel of defendant, on cross-examination of a witness who was a mining engineer, produced by the plaintiff, asked him:

"You say that this interference produced a necessary peril.

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At the time Gorrell, with his gangway, broke into breast 9, could not that difficulty have been avoided by a fair elevation of his gangway, so as to have avoided the gangway of Mr. Freck?"

The plaintiffs objected to the question, because there was no duty on Gorrell to change his course of mining, and no control over him by the plaintiffs. The court sustained the objection.

The defendant, on the cross-examination of a mining engineer and a witness on the part of the plaintiff, who had testified to the location of the gangway driven by the defendant, proposed to ask him: "State, when the gangway struck the rise or pitch where it turned or deviated first toward the south in following the bottom slate, whether they did not pursue the best and most approved methods of determining the synclinal axis by the course of the gangway itself?"

The court also sustained the objection to this question. The following points were presented by plaintiff, all of which the court affirmed:

2. By the lease from the company to Gorrell, no right whatever was reserved to prevent Gorrell turning the water of the Hazeldell into Centralia, and the only right they had in that respect was precisely what they would have if they had not been Gorrell's landlord.

5. If the defendant extended his workings beyond the boundary line fixed by the lease, and thereby the colliery leased to him became connected with the adjoining colliery, the defendant is liable for any damage the owners of the colliery necessarily suffered in consequence.

6. If the Centralia colliery, by means of the connection thus formed, became liable to the flow of water from Hazeldell, and the risk of that liability diminished the renting value of Centralia, and the lessors sustained a loss, the defendant is liable for the amount of the loss thereby suffered by the landlord.

The following points were submitted by defendant, to which are subjoined the answers of the court:

1. That it appears, by the lease from plaintiffs to defendant, that the south dipping veins were leased to defendant, and by the lease from plaintiffs to Gorrell, that the north dip-

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ping veins were leased by plaintiffs to Gorrell, and it is a conceded fact that these veins meet and intersect at the bottom of the basin; that if the jury believe that plaintiffs thus, by their own act, provided for and authorized the interference and intersection of the two workings, and the consequent opening of communication between the two mines, and that the workings of Gorrell, closely approaching the bottom of the basin, would, in a very short time, have produced such connection of the two mines, plaintiffs can not recover for the consequences of such connection.

Ans. "I affirm that point, so far as it applies to the state of facts which have been proved before you. It undoubtedly is a supposable case, that if the defendant had mined the south dipping vein down to and along the axis, which he had a right to do, and if Gorrell had mined the north dipping vein down to and along the axis, which he had a right to do, there would have been, along the entire course of that axis, if it was opened at all, a joint gangway or opening of these two mines. That would have been a perfectly legal act, I think, of both the defendant and Mr. Gorrell; and for any injury that might have resulted from such an opening as that the plaintiff would have no remedy against Freck. But if you are of opinion that the opening which was made was a different kind of opening from that, and produced different consequences, if it was an opening caused by the trespass of Mr. Freck beyond his own boundary, then the applicability of that point does not arise, and you should consider the case independent of that."

2. That if the jury believe the best scientific, as well as the best practical methods known to the art of mining were employed by defendant in working the south dipping veins, as he approached and arrived at the bottom of the basin, and that such scientific and practical methods, faithfully employed, would not have enabled defendant to make any more accurate ascertainment of the true position of the synclinal axis than he did through his workings, then there can be no recovery by plaintiff.

3. That the lease is to be interpreted in the light of the best methods known to the science of mining, and that both parties to it are to be understood as having these in view when

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they contracted, and that if the veins were mined only in the methods and to the extent which such scientific methods prescribe, there can be no recovery by plaintiff.

Ans. "Neither of these points are accurate statements of the law. They are the theory which the defendant's counsel has argued to you, but they are not the theory which I think governs this case.

"When a person approaches a point in which his rights come to be in doubt, and it is a matter of difficulty and danger to ascertain whether he is exactly right or not, it is his duty to stop short or to go on at his own risk. If he does go on, not having any certain light, he is responsible for the consequences.

"That the precise location of the synclinal axis is purely a question of fact, and exclusively for the determination of the jury, and that if the jury believe defendant did not transgress that line, as located by the jury, there can be no recovery by the plaintiff."

In the general charge, the court, MITCHELL, J., also said:

"This lease gave as a boundary of the premises leased to the defendant, on the south side (and that is the only side with which we are concerned in this controversy), what is called the bottom of the basin, or, more technically, and perhaps more accurately, by some witnesses, the synclinal axis.

"This axis, of course, you will understand, is an imaginary line, but it is the line where the north and south dips come together, wherever that may be. This line, theoretically, is as fixed and definite as any boundary line can be; but practically, it is a matter of very considerable doubt and difficulty to locate it exactly upon the land. Especially is this the case in the early part of the workings of a mine, before the bottom of the basin, or what may be called the debatable ground, through which this axis runs, has been laid open to admit of accurate measurement by scientific means. [Now, the difficulty in knowing where the correct line is, which forms the boundary of the defendant's lease in this case, does not in any way affect the rights of the parties.] It is not your business, as members of the jury, nor is it mine, to make contracts for other people, or to say that they ought to have made their contracts different, in order to avoid disputes. That was their

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own business. The parties in this case have made their contract, and your duty and mine is to see that each performs his proper duties, and obtains his proper rights under the contract which they have made.

[" The synclinal axis, therefore, was the boundary which defined the defendant's rights in this case, and working across that boundary, whether it was easy or difficult to ascertain, whether it was done intentionally or in ignorance, was a trespass for which the defendant is liable, if any damage has thereby occurred to the plaintiffs."]

The verdict was for the plaintiff for $17,000. The defendant assigned for error the rulings of the court on the foregoing offers of testimony, the answers to points and the portions of the charge in brackets.

F. W. HUGHES and E. O. PARRY, for plaintiff in error.

A. SIDNEY BIDDLE and R. C. MCMURTRIE, for defendant in error.

Mr. Justice GORDON delivered the opinion of the court, May 6, 1878.

The principles, as well as the main facts of this case, are few and simple. The whole body of coal mentioned in the leases with Freck & Blackiston, and with Gorrell & Co., the former dated August 18, 1862, the latter January 11, 1868, belonged to the Locust Mountain Coal and Iron Company. The general vein or stratum thus leased lay in the Centralia or Centreville basin, and a cross-section of it, in shape, resembles very much the letter V, except that the vein is rounded at the bottom. The northern part, called the "south dip," was that leased to Freck & Blackiston; the southern side, or "north dip," to Gorrell & Co. It follows that the line dividing these two leases was the middle line of this basin, or that from which the two sides begin to ascend, called, technically, the synclinal axis. Either or both these parties had the right, under their respective leases, to take out all the coal down to this line. The coal company was the common lessor of both parties, and hence the rules governing adjacent mines when owned by different owners, can not

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apply to the company plaintiff, for, having the power so to do, if it neglected to protect itself by covenant it can not plead rules, resulting *ex necessitate rei*, as against its own grant. It follows that if both parties, in strict accordance with the terms of their several leases, had worked down to the synclinal axis, they would have brought the two mines together, and so produced every result now complained of, except such as may have arisen from the criminal negligence of one or both of the lessees. The company, therefore, has no right to complain of the mere conjunction of these workings, for this is but the result of its own grant; and it follows that unless it can show some wrong done in the *manner* in which Freck conducted his workings, it has no standing to maintain this suit. Now as there is no question as to the character of Freck's work, so far as his own lease extended, our inquiry must be limited to a single point, to wit: was the damage complained of the result of Freck's *willful* trespass upon the adjacent lease? His southern boundary, the synclinal axis, could, by no human possibility, be ascertained until developed by the proper workings. Yet Freck had the right, under his lease, to go to that line, and this necessarily involved the further right of ascertaining this line, by the best means in his power. It is here that the court below committed an error, in treating the case as one between distinct landowners; in such case the doctrine that the lessee must ascertain the dividing line at his peril would be correct, and though he passed over it with the best possible intentions, he would nevertheless be a trespasser. Not so when the lessor not only gives his tenant the power, but makes it his duty, to explore and mark a theoretical line upon his own premises. In such case the tenant can not be treated as a trespasser if, in an honest attempt to ascertain that line, he should chance to pass over it; for the right to do what is necessary in order to find and fix that line, is implied in the grant by which it is made a boundary. Freck had a right to ascertain his southern line, and if he did no more than was necessary for this purpose he was not a trespasser. The difficulties in the accomplishment of this result become apparent by a glance at the map before us, on which we observe the plottings for the synclinal axis in no less than five different places. It is thus apparent that the true line, the one

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finally adopted, was only conclusively settled after Freck's workings had enabled the engineers to ascertain its true location.

But there was not a day, not an hour, during the progress of this work, when this company had not the power to put an end to these operations, on the discovery that the lessee was working beyond the bounds of his lease.

In that lease it had retained full supervisory powers; the work was done under the constant inspection of its own engineer, and in case of dispute it had the power to settle all matters by arbitration. And if, under such circumstances, being fully and accurately informed of Freck's operations, it chose to stand by and permit him to prosecute his researches according to the best of his judgment, at the same time receiving the products of his labor as so much rent under the lease, by what rule of justice can it now treat him as a trespasser? If we examine the notice of Mr. Stockett, the plaintiff's engineer, dated April 21, 1871, when Freck's gangway had already been driven south of what afterward proved to be the true synclinal axis, we find two things worthy of observation. 1. He is notified, not that his gangway, but "a part of the breasts turned on the south side of your east gangway of the second lift on the Mammoth vein, is beyond the limits of your lease." 2. That "the object of the notice is to prevent any infringement on the rights granted to the lessees." Thus we observe that even as yet the true position of the dividing line was not discovered, and that the defendant's workings were not regarded as likely to prove injurious to the rights of the company, and he was warned only to avoid interference with the lease of the adjoining tenants. Then we have Mr. Stockett's letter of the same date to the president of the company, detailing the conversation he had had with Freck and his mining boss, Williams; the confidence they expressed that there was yet another south dip between the breasts referred to and the adjacent lease of Gorrell & Co., and his own opinion that whilst this was possible it was not probable. Thus the company, by its own officer, was put into possession of every detail, not only of Freck's doings but of his intentions and opinions, and if it trusted him, without remonstrance or caution, to pro-

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ceed with his experiments in good faith, we can not see why it should complain of the result.

Again, the defendant ought not to be held liable for damage resulting from the neglect of either the plaintiff or Gorrell & Co. It is manifest from the facts of this case, as well as of the case of this same plaintiff against the last named company, as reported in the Leg. Int. of 29th March, 1872, that much if not all of the damage to the Centralia mines resulted from the intentional acts of the lessees of Hazeldell, in so sloping their gangway as to throw the water into the Freck workings. But the plaintiff had the same powers over Gorrell & Co. that it had over Freck & Blackiston, and if it passively permitted the former to do that which proved disastrous to its own property, it can not cast the burden of its own negligence over upon the defendant. We see, from the case above stated, that when it chose to move there was no want of powers, and that it could then make itself felt to some purpose, not only through the reserved powers of the lease, but also through the strong arm of this court.

Without dwelling upon any of the numerous exceptions, we but suggest, by way of summary, the following principles for the retrial of this case.

If the crossing of the line of the two leases, by Freck, resulted from an error in judgment in an honest attempt to develop that line—if the company permitted him to exercise his own judgment concerning this matter, by passively or actively acquiescing in what he did, or if the damage resulted from the direct acts of the lessees of the north dip—the defendant is not responsible for the consequences flowing from any or all of such acts. In such case the plaintiff ought only to recover the difference in the price of the coal which the defendant took from the north dip, and that which came from his own workings, as measured by the prices fixed in the two leases—we believe some ten cents per ton.

Furthermore, it will be proper for the court below to admit all such testimony as may bear upon the manner and character of the defendant's work in the mines, and theory and intent governing it.

The judgment is reversed and a venire facias de novo is awarded.

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BOWYER V. SEYMOUR ET AL.

(13 West Virginia, 12. Supreme Court of Appeals, 1878.)

Forfeiture on non-payment of royalty. A lease provided that default of payment of royalty should be considered "an abandonment of this lease." *Held*, that the expression was equivalent to "considered abandoned" or "void," and only to be operative at the option or election of the lessor.

[1] **Entry for non-payment.** Where the tenant fails to comply with such covenant and the landlord has made demand at the time and place and in the manner prescribed by common law, and such demand is not complied with, the landlord may, at his option, enter upon the leased premises, or such part thereof as can be entered upon by him.

Election to bring ejectment. But if he does not re-enter, in fact, he may bring ejectment under § 16, Chap. 93 of the Code.

[2] **Demand of rent in unlawful detainer.** If the landlord bring unlawful detainer he can sustain the action (if at all) only after strict proof of demand of rent as at common law, and proof of a re-entry, or its equivalent, before commencement of his action.

Reversal for error on points of evidence. The appellate court will not usually reverse for error in the exclusion of proper or reception of improper evidence by the court below, unless it can be seen from the record that such evidence was relevant (material), and that the party complaining may have been injured by the ruling.

An appeal, with *supersedeas* granted upon petition of John Bowyer, from and to a judgment of the Circuit Court of Putnam County, rendered on the 23d day of April, 1874, in an action of unlawful detainer, in which said John Bowyer was plaintiff and Seymour Seymour et al., were defendants.

Hon. JOSEPH SMITH, Judge of the Seventh Judicial Circuit, rendered the judgment complained of.

The facts of the case sufficiently appear in the opinion of the court.

WESLEY MOLLOHAN, for the plaintiff in error.

SMITH & KNIGHT, for the defendants in error.

HAYMOND, Judge, delivered the opinion of the court.

[1] May not re-enter by force: *Slavonian Co.* v. *Perasich*, 1 M. R. 541.
[2] *Miller* v. *Sparks*, 6 M. R. 231.

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This is a case of unlawful detainer, commenced and prosecuted by the plaintiff in the Circuit Court of the county of Putnam, against the defendants, to recover possession of the tract of land described in the summons issued in the cause. The proceeding is based upon chapter 89 of the code of 1868, of this State. The summons in the case was issued in pursuance of provisions of said chapter of the code on the 15th day of August, 1873, and was made returnable to the first day of the next October term of Circuit Court of said county of Putnam, and was against Jesse F. Tainter, Seymour Seymour and Edward Burkley. The summons was returned, duly executed upon Seymour Seymour and Edward Burkley, and "not found" as to Jesse F. Tainter.

At the October term, 1873, of said Circuit Court of said county of Putnam, and on the 23d day of October, 1873, came before said court "the plaintiff, by his attorney, and the defendants, S. Seymour and Edward Burkley, by their attorneys; and thereupon the said defendants for plea in this behalf say, they are not guilty of unlawfully withholding the premises in controversy in this cause; and of this they put themselves upon the country; and the plaintiff doth the like;" and issue was thereupon joined; and thereupon came a jury of twelve good and lawful men, who were well and truly sworn to try whether the defendants unlawfully withhold the possession of the premises in controversy in this cause, and after hearing the evidence offered returned their verdict to the court that the defendants, Edward Burkley and Seymour Seymour, were not guilty."

Afterward, on the 25th day of October, 1873, the plaintiff moved the court to set aside the verdict of the jury rendered in the cause, and award him a new trial, on the ground that the court erred in excluding the proof, as set out in the bill of exceptions filed in the cause; which motion the court overruled.

Afterward at a circuit court, held for said county on the 23d day of April, 1874, it appears that the parties again appeared in court in the cause, and the court rendered judgment on the verdict of the jury in favor of the defendants against the plaintiff, and for the costs of the suit.

It further appears, that on the said 25th day of October, 1873, the plaintiff tendered a bill of exceptions to the opinion

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and ruling of the court made during the trial of the cause, by which bill of exceptions it appears that the plaintiff, to support the issue on his part, first introduced, with objection, a contract, which is in these words:

"This indenture, made this 29th day of April, A. D. 1872, by and between John Bowyer, of Winfield, Putnam county, State of West Virginia, party of the first part, and Seymour Seymour, of the city of New York and State of New York, party of the second part, witnesseth:

"That for and in consideration of $1.00 in hand paid, receipt whereof is hereby acknowledged, and for the further consideration hereinafter named, to be kept and performed by said party of the second part, the said party of the first part doth lease unto the said party of the second part all the mineral, coal, and iron ore, underlying the lands of the said John Bowyer, lying in said county of Putnam, said lands being bounded as follows:

"On the north by the lands of Lewis Summers and heirs of William Gillespie; on the east by lands of L. Summers, aforesaid; on the south by lands of heirs of W. Erwin, W. W. Love, and S. McGuire; on the west by lands of Lewis Vintroux's heirs, being the Coal Branch survey, containing five hundred and sixty acres, the Horse Creek survey, containing six hundred and forty-eight acres, and a certain survey adjoining, containing one hundred and sixty-two acres; the whole containing thirteen hundred and seventy acres, more or less.

"In consideration of the said lease, the said S. Seymour agrees to proceed to operate for the mining of coal, and agrees to pay for all the coal mined and taken away from said lands the sum of ten cents for each and every ton of twenty-two hundred and forty pounds; the amount of coal mined to be ascertained and determined by the weight books kept by ——— of the second part; and the party of first ——— shall have access to the same at all reasonable times, for the purpose of ascertaining amount of coal taken away. It is further agreed, if said second party should discover iron ore of sufficient quantity and quality to justify the mining thereof, they shall pay for each and every ton so mined the sum of ten cents; said ton to consist of twenty-two hundred and forty pounds.

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"And said party of the second part agrees to mine or pay for the same, in the first year, the amount of two thousand tons. Payment for the same, and for all coal and iron ore mined, shall be made on the first day of May and the first day of November in each and every year; said payment to commence on the first day of November, 1872. A failure to make such payment within sixty days after such payment is due, shall be considered an abandonment of this lease. And should such party of second part cease operations for mining on said property for a period of twelve months, such cessation of operations shall be deemed an abandonment of said lease; or a failure to commence operations in good faith for a like period of twelve months from date hereof shall be considered an abandonment hereof.

" And said party of the first part agrees to, and does, grant to party of second part the right to erect buildings for use of mines, and for the necessary operations of mining, and the right to build and make roads and railroads for the transportation and working of said coal, and the right to cut and use timber for the use of the mines, and for building cabins for the use of the miners; and no timber shall be carried away, but shall be used on the premises; also the right to use and occupy all the buildings on the said lands.

" If the party of the second part should elect to give up this lease he shall, upon giving sixty days' notice, have the right to remove all machinery and improvements that may have been made, excepting such cabins and buildings made from lumber cut on lands aforesaid, which, in case of abandonment, shall be left on the land.

" It is further agreed that after the first year as aforesaid, the said second party shall mine or pay for four thousand tons yearly; payments to be made semi-annually as aforesaid. And it is mutually agreed that neither party shall erect, or allow to be erected, any buildings for the purpose of the sale of intoxicating liquors; and further that nothing herein shall prevent the party of the first part from drilling and boring for oil or salt water and working the same, providing he shall not interfere with the operations for mining." (With attestation clause, signatures, seals, acknowledgment and recorder's certificate.)

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Plaintiff then proved by a witness, Jerome T. Bowyer, that the land mentioned in said summons was the same as that mentioned in the contract, and that it was in Putnam county, and that the defendants took possession of the land under said contract, and were in possession of the same, when this action was brought; also that the money mentioned in said contract, to be paid by said Seymour to said John Bowyer on the 1st day of November, 1872, had not yet been paid; that in April, 1873, said witness, as agent for plaintiff, called the attention of said Seymour to the fact that said money was due and had not been paid, and read the said contract to him and told him it was "abandoned;" that Seymour replied that it does read that way, but you will not hold me to it; to which witness replied that said contract was now at an end; and they proposed to let it remain so. Plaintiff also proved that said Seymour had repeatedly since asked to fix the matter up by a new contract, which plaintiff had always refused to do, and then rested his case; and the defendants introduced no evidence at all. And thereupon the defendants ask the court to exclude all of the above parol proof relating to the abandonment or forfeiture of said contract; which motion was resisted by plaintiff, and the same being argued and considered by the court was sustained, and all of said proof excluded from jury. To which opinion and ruling of the court the defendant excepted, and prays that the same may be signed, sealed and saved to him, which is here done, and made a part of the record of this cause.

"J. SMITH. [SEAL.]"

To the said final judgment, rendered in this cause by said circuit court on the 23d day of April, 1874, the plaintiff hath obtained from this court a *supersedeas*, upon his petition and assignment therein of error.

Thus the case is now before us for review, and determination as to whether there is error sufficient in said judgment, to the prejudice of the plaintiff, to authorize this court to reverse the same.

The errors assigned by the plaintiff in the said judgment are as follows:

"1st. The court erred in excluding from the jury the evidence, set out in the bill of exceptions, in regard to the aban-

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donment of the lease, which lease is fully set out in said bill of exceptions.

"2d. The court erred for the reasons aforesaid in refusing to set aside the verdict and award a new trial."

In the proceeding of unlawful detainer, when the summons is executed on only two of three defendants, the plaintiff may proceed against those upon whom the summons is served, although there can be no judgment against the other defendant: *Harman* v. *Odell*, 6 Gratt. 209.

In order to a proper determination of this cause, upon the questions involved in the assignments of error aforesaid, it is necessary to ascertain and determine, in the first place, the legal effect of the said deed of lease and the rights of the plaintiff thereunder for the failure of the defendant, Seymour, to pay the rent money covenanted to be paid at the time specified in the lease, and the duty or acts to be performed by him in order to terminate said lease or give him the legal right to re-enter upon the premises because of the failure of the tenant to pay the rent at the time specified in the lease.

The provision in the lease, in respect to rent, is: "A failure to make such payment in sixty days after such payment is due, shall be considered an abandonment of this lease," etc. It seems to me that the words "shall be considered an abandonment," etc., as employed in the lease, must be considered in a legal aspect, when applied to this lease, as amounting to no more than, and in fact as being equivalent to, the words "shall be considered forfeited," or the words "shall be considered void." Not only may the lessor re-enter for a forfeiture, but his heir or executor may also re-enter when entitled to the reversion.

But it is entirely optional with the lessor whether he will avail himself of this right of entry or not, although by the terms of the proviso the term is to cease, or become void, for the non-performance of the covenants; and if the lessor does not avail himself of it, the term will continue. There was, however, a distinction formerly drawn between leases that were declared to be void upon a breach of condition, and such as were to be voidable only. In the case of a lease for lives, if the lessee was guilty of any breach of the condition, the lease was only voidable, although by its express terms it was to

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become thereby absolutely void; and the landlord might waive his right to re-enter, by the acceptance of rent, or by some other act which amounted to a dispensation of the forfeiture. But upon the breach of such a condition on a lease for years, the lease became *ipso facto* void, and no subsequent recognition could set it up again. Yet if the condition in such case was merely that the lessor might re-enter, the lease was voidable only, and might be affirmed by an acceptance of rent if the lessor had notice of the breach at the time. But the force of this distinction has been almost, if not quite, abated by the modern decisions, which establish that the effect of a condition, making a lease void upon a certain event, is to make it void at the option of the lessor only, in cases where the condition is intended for his benefit, and he actually avails himself of his privilege.

The English law in this respect has been generally followed in this country; and such a lease is good until avoided, though the lessee is estopped to set it up against the lessor: Taylor's Landlord and Tenant, pp. 361, 362 and §§ 492, 288; *Arnsby* v. *Woodward*, 6 B. & C. 519;. *Reede* v. *Farr*, 6 M. & S. 121; *Doe* v. *Bancks*, 4 B. & Ald. 401; *Roberts* v. *Davey*, 4 B. & Ad. 664; *Doe* v. *Birch*, 1 M. & W. 402; 1st Vol. 5th Ed. of Parsons on Contracts, page 506; Vol. 2, Platt on Leases, p. 327; 1 Smith's Leading Cases, 19.

Parsons on Contracts, 1st Vol., 5th Ed., 506, says: "A distinction formerly prevailed between a proviso declaring that the lease should be void on a specified event, and a proviso enabling the lessor to determine by re-entry; and it was held that in the former case the lease became absolutely void on the event named, and was incapable of being restored by acceptance of rent or other act of intended confirmation; while in the latter, some act such as entry or claim must have been performed by the lessor to manifest his intention to end the demise which was voidable in the interval, and consequently confirmable. This distinction, however, is now exploded, and it is held that the lease is voidable only at the election of the lessor, but not of lessee, though the proviso expressly declare that it shall be void," etc.

The lease in question did not become absolutely void on the 1st day of November, 1872, by the failure of the tenant to pay

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the money or rent, then covenanted to be paid, but only voidable at the option of the plaintiff, the landlord.

In general when an estate is defeasible on the non-performance of a condition subsequent, it is not absolutely defeated upon the happening of the contingency on which it is defeasible; the estate will continue afterward unless the grantor or his heirs take advantage of the breach of condition by an actual entry, which is generally necessary to revest an estate of freehold. A different rule formerly prevailed with regard to a term for years, and it was considered that a breach of condition of the lease absolutely determined it and could not be set up again by any act, even on the part of the landlord; but this doctrine is no longer recognized: Taylor's Landlord and Tenant, § 288, top p. 209.

Mr. Lomax in the second edition of his Digest, Vol. 2d, at top page 129, says: "But it is settled by modern authorities that notwithstanding the proviso in the lease, that it shall be *ipso facto* void to all intents and purposes, the lease is nevertheless not entirely vacated, but only as against the lessee; and it leaves the lessor the option of entering for the forfeiture or not, at his pleasure. The modern construction of the rule is founded upon principles of justice; for, according to the old distinction, the lease would virtually be determinable at any time at the will of the lessee, who by his own violation of the stipulations in the lease might insist that the lease had determined."

Chancellor Kent, in the sixth edition of his commentaries, in the fourth volume, at page 125, says: "Subsequent conditions are those which operate upon estates already created and vested, and under them liable to be defeated. Of this kind are most of the estates upon condition in law, and which are liable to be defeated on breach of the condition, as on failure of payment of rent, or performance of other services annexed to the estate." And, at page 126 of same book, the chancellor says: "The material distinction between a condition and limitation consists in this, that a condition does not defeat the estate, although it be broken, until entry by the grantor or his heirs; and when the grantor enters, he is in, as of his former estate. His entry defeats the livery made on the creation of the original estate, and consequently all subsequent

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estates or remainders dependent thereto. Conditions can only be reserved for the benefit of the grantor, and his heirs; a stranger can not take advantage of the breach of them. There must be an actual entry for the breach of the condition, or there must be, in case of non-payment of rent, an action of ejectment brought as a substitute, provided by the statute of 4 Geo. II, c. 2, for the formal re-entry at common law; and which provision on this point is adopted in New York, and in several of the other States which have followed the English system; but it is in the nature of a limitation to determine the estate, when the period of the limitation arrives, without entry or claim; and no act is requisite to vest the right in him who has the next expectant interest."

The lease in the cause before us is not a lease for a term of years, but it is a perpetual lease perhaps, under the 8th section of chapter 71 of the code of 1868 of this State. Be this as it may, it is certainly a lease for not less than for life, if it in fact amounts to more than a license, and I think it is more than a license. "Leases may also be of perpetual duration; and they are usually in form a grant of the land in fee, reserving the payment of an annual rent, instead of a present consideration; and of this class the New York manor-leases, and the fee-form leases in Pennslyvania, are specimens; or they may be leases to continue so long as the lessee shall continue to pay the rent, and perform the covenants contained therein: thus a demise to A B, his heirs and assigns, for such a term of time as he pays rent, he on his part covenanting for himself and his heirs to pay rent and perform covenants, is a perpetual lease, and can only be terminated by the mutual agreement of the parties, or until the lessor shall elect, on default, to pay the rent and perform the covenants to consider it forfeited." Taylor's Landlord and Tenant, § 72, pp. 52, 53; *Folts* v. *Huntley*, 7 Wend. 210.

But whether the lease under consideration be a perpetual lease, or a lease for life, is wholly immaterial so far as this case is concerned; for at common law, in either case, the landlord can only terminate the lease by re-entry, if the estate leased be in whole or part susceptible of an entry: *Arnsby* v. *Woodward*, 6 B. & C. 519, top page 241; *Doe* v. *Nash & Birch*, 1 M. & W. 402; Adams on Ejectment, with notes, published in 1846, top page 198, and side page 197.

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At common law, when a forfeiture was sought to be enforced for the non-payment of rent, there was no distinction made between cases where there was a sufficient distress upon the premises and where there was not. In general, before a landlord could enter for the non-payment of rent he must have made a formal demand of the precise *sum due* for the last current quarter; and if the demand included any portion of the rent of a previous quarter it would have been bad. It must also have been made on the day it became due or legally demandable, at a convenient time before sunset, at the place where, by the terms of the lease, it was made payable; or if there be no place mentioned in the lease, at the most notorious place upon the demised premises, which, if there be a dwelling house, is the front door. But the lessee might seek the lessor at any time during the natural day, that is before twelve at night, on which the rent becomes due, and make a personal tender of the rent in order to save the forfeiture, etc.: Taylor's Landlord and Tenant, § 493; Adams on Ejectment, with notes, 161 top page and 160 side page.

But to avoid some of the foregoing inconveniences and niceties of the common law, the statute of George II, c. 28 was enacted: Adams on Ejectment, with notes, page 162. For this purpose the legislature of this State enacted the 6th and 16th and 17th sections of chapter 93 of the code of 1868, which are substantially the same as in the code of 1830 of Virginia. As I do not see, as the case stands, or is now presented, that the 6th section is involved in it, I shall confine myself to the said 16th and 17th sections. These two last named sections are as follows, viz.:

"16. Any person who shall have the right of re-entry into lands by reason of any rent issuing thereout being in arrear, or by reason of the breach of any covenant or condition, may serve a declaration in ejectment on the tenant in possession, when there shall be such tenant, or if the possession be vacant, by affixing the declaration upon the chief door of any messuage, or at any other conspicuous place on the premises; which service shall be in lieu of a demand and re-entry; and upon proof to the court, by affidavit, in case of judgment by default, or upon proof on the trial, that the rent claimed was due upon the premises, or that the covenant or condition was

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broken before the service of the declaration, and that the plaintiff had power thereupon to re-enter, he shall recover judgment and have execution for such lands.

"17. Should the defendant, or other person for him, not pay the rent in arrear, with interest and costs, nor file a bill in equity for relief against such forfeiture within twelve months after such execution executed, he shall be barred of all rights in law or equity to be restored to such lands or tenements."

There are other sections of said chapter having some relation to the subject, but I deem it unnecessary now to notice them. As this statute in effect dispenses with a demand for rent in those cases only where there is no sufficient distress upon the premises, it is still necessary for the lessor to comply with all the formalities of the common law before he can proceed upon a claim of re-entry for the non-payment of rent if a sufficient distress can be found. And I presume the same rule applies where the lease on its face is declared to be absolutely void in case of its non-payment: Adams on Ejectment top page 168, side page 169; Taylor's Landlord and Tenant, § 297.

The plaintiff in this case, as we have seen, did not bring his action of ejectment, but brought his action of unlawful detainer. It is quite clear that plaintiff, in an action of unlawful detainer, is not entitled to the benefits of the provisions of said 16th section of chapter 93 of the code, as to "a demand and re-entry," said section only applying to actions of ejectment. To enable the plaintiff to sustain his action of unlawful detainer, if he could sustain it at all in such a case as the one before us, he must prove not only a demand for the rent due at the time and place, and in the manner prescribed by the common law, but must also, where a re-entry can be made on the leased premises or any part thereof, prove such re-entry or its equivalent, before action brought.

This rule, as to re-entry by the landlord before action brought by him to recover the premises by reason of a forfeiture of the lease, was not enforced, and was held not to apply at common law in cases of ejectment brought by the landlord against the tenant, because it was considered that the confession of lease, entry and ouster was sufficient without proof of re-entry: *Little* v. *Heaton*, 1 Salk. 259. And in the

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case of *Goodright* v. *Cator*, 2 Doug. 477, it was held, that actual entry is not necessary to take advantage of a clause in a lease to re-enter for non-payment of rent. In that case Lord Mansfield, at page 483, says, "I have always taken a distinction to be, that where entry is necessary to complete the landlord's title (as where a power is reserved to him in case of non-payment of rent) then the confession of lease, entry and ouster is sufficient." Adams on Ejectment and the notes 158; Id. 278; Taylor's Landlord and Tenant, § 298.

Neither of these essential prerequisites, to wit, demand and re-entry, were proved by the plaintiff in this cause at the trial. The plaintiff, having closed his evidence in chief, as I infer from the bill of exceptions, and the defendant, having ntroduced no evidence, moved the court to exclude the parol evidence which had been given to the jury, which the court did; and it not appearing that the plaintiff had adduced before the jury any evidence tending to prove any legal demand of the rent due, or a re-entry by him, or that he offered to give any such evidence to the jury after said parol evidence, in the bill of exceptions mentioned, was excluded from the jury by the court, I am unable to see, under the circumstances, that the said parol evidence, so excluded by the court from the jury, was relevant to the issue in the cause, or that the plaintiff could have possibly been prejudiced by its exclusion from the jury.

It does not appear by the bill of exceptions that the plaintiff offered any evidence to the jury tending to prove an abandonment or forfeiture of the lease, under any of the provisions or conditions thereof except that for the non-payment of rent or money; and it does not therefore appear that the court, by excluding said parol evidence, under the circumstances detailed in the bill of exception, made any ruling from which it can be fairly inferred that the court thereby, in any respect, prevented or hindered the plaintiff from proving by relevant and proper parol evidence, any of the causes of abandonment or forfeiture provided for in said contract, or that the court decided, in effect or otherwise, that the plaintiff should not prove his case by legitimate evidence.

There are cases, which by the common law will work a forfeiture of a lease under some circumstances other than pro-

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visions or conditions contained in the lease; but, as they are in no wise involved in this cause, I deem it unnecessary to specify them, or to refer to or indicate, in any respect, what it would or might be necessary for the landlord to do in such a case, to enable him to recover in an action such as this, or in ejectment under our statute.

Generally, when the court below excludes evidence adduced by a party, from the jury, or refuses to admit evidence offered by a party, and such party excepts to such action of the court, the appellate court will not reverse the judgment of the court below for such action, unless it can be seen from the record that the evidence, so excluded or rejected, was relevant to the issue, and that such party may have been prejudiced by the exclusion or rejection of such evidence.

As the judgment of the court is never conclusive in an action of unlawful detainer, appellate courts do not regard writs of error and *supersedeas* in such cases so favorably when the judgment of the court below does not tend to produce a change of possession, as when it does. There being no error in the ruling of the circuit court in excluding said parol evidence from the jury, it follows that there is no error in the circuit court refusing to set aside the verdict of the jury and grant the plaintiff a new trial for the exclusion of said parol evidence.

For the foregoing reasons it seems to me that there is no error in the said judgment of the Circuit Court of the county of Putnam, rendered in this cause on the 23d day of April, 1874; and the same must therefore be affirmed, with costs and $30 damages to the appellees.

The other judges concurred.

Judgment affirmed.

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THE KEMBLE COAL AND IRON CO. v. SCOTT ET AL.

(90 Pennsylvania State, 332. Supreme Court, 1879.)

[1] **Contract construed as a present lease with fixed covenants, and not as an executory arrangement with stipulations.** Plaintiffs agreed to "grant, let and lease" for eleven years, the exclusive right to mine the iron ore from certain described tracts. In consideration thereof the defendants, an iron company, bound themselves to pay on the 15th day of each month fifty cents per ton for every ton of iron ore mined and taken away the month previous. Defendants were to pay for the first year royalty upon as many tons as they might be able to mine, but for any period of three years thereafter the rent was to be in the aggregate not less than $10,000. At the end of four years defendants were sued for $10,000 under this covenant: *Held*, that the agreement was not an executory but an executed contract; that it was not an agreement for a lease, nor a license, but a present lease; and that it contained nothing to support the idea that the clause for payment of the $10,000 was a mere stipulation which might be avoided by abandonment or surrender, or that the amount was not payable until the expiration of the entire term.

Facts not amounting to mutual abandonment. Lessees ceased operations in 1873, to the knowledge of lessors, and no royalty was paid or demanded until 1876, when the first period of three years had elapsed: *Held*, that the jury could not presume from this that the contract was ended by the mutual consent of the parties.

Lessee taking risk of title. In the negotiation immediately preceding the agreement, the vice-president of the company, who conducted the negotiation, had written to plaintiffs that if the lease could be effected defendants would take the risk of plaintiffs establishing their title to one of the tracts: *Held*, that it was proper to leave to the jury, and for them to find, "that the defendants took the tract with knowledge of the title and at their own risk."

Error to the Court of Common Pleas of Bedford County.

Covenant by Thomas A. Scott, Henry A. Stiles, executor of Robert H. Gratz, deceased, Samuel L. Russell and Jonathan H. Seymour, against The Kemble Coal and Iron Company, upon certain articles of agreement, the material portions of which will be found in the history of the case below. The defendant pleaded *non fecit conventiones, non fregit conventiones*, covenants performed, covenants performed *absque hoc*,

[1] Correspondence and stipulation for a lease do not amount to a present demise: *Jones* v. *Reynolds*, 1 Q. B. 506.

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payment with leave, etc., and that under these pleas defendant would offer in evidence at the trial—

1. All the facts and circumstances admissible in evidence under the pleadings without notice.

2. All the facts and circumstances mentioned in the "additional affidavit of defense," filed October 12, 1876.

3. That the contract sued upon is not a lease, but a "license."

4. That the lapse of time and acquiescence of plaintiffs have been such as to render it inequitable to enforce a specific performance of the contract, which was executory.

5. That the tribunal required to be selected, by the contract, has exclusive jurisdiction in the premises.

6. That the railroad or branch road provided by plaintiffs at and before the making of the contract has not been constructed.

The defendant subsequently moved the court for leave and was allowed to amend as follows:

1. Amend pleas by adding to those already filed the plea of "performance with leave."

2. Amend special matter by adding want of title in plaintiffs to the land described in the article upon which suit is brought.

3. Misrepresentations and mistake as to the value, character, extent and accessibility of the iron ores supposed to be granted by the agreement.

5. General report and belief that a branch railroad would be constructed from, at, or near Mt. Dallas, to, or near to the iron ores mentioned and granted in the agreement, and that the contract was made upon that opinion and no such branch railroad was constructed.

6. That it was not possible, by any degree or amount of effort, to finish, tunnel and take out ore prior to the commencement of this suit.

7. That the iron ore does not exist in the premises granted, as was supposed and believed when the agreement was signed.

8. That defendants never took possession of the premises or any part thereof.

9. All the facts stated in defendants' "amended affidavit of defense," filed October 12, 1876.

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10. All the facts stated in "defendants' pleas" and the first six items of the "notice of special matter."

11. That defendants executed the agreement under a mistaken belief, opinion or understanding of its construction, having signed the same with an honest belief that the clause requiring not less than $10,000 in any period of three years was not a covenant, but a mere stipulation, for the non-performance of which the contract might be revoked or canceled by plaintiffs.

12. Concealment in this: Plaintiffs, or some of them, or some person with their knowledge, sunk a shaft upon the ore vein within or near to the premises embraced in the agreement, and found it to be small, not of sufficient quantity to justify tunneling and other expenses necessary to reach and obtain it, and this information was withheld from defendants until after the execution of the agreement in suit.

The additional affidavit of defense above alluded to was made by William Lauder, an agent of defendants, and averred that certain promises and representations of plaintiffs, in regard to the construction of a railroad from the leased lands, were part of the inducement which led the defendants to execute the contract; that the nature and character of the soil, and the rock therein, were such as to render it impossible to reach the ore so as to take out the quantity named, and that there was no evidence that there was any ore on the premises, or in sufficient quantities to justify mining and the taking of the number of tons required by the contract; and that this question had never been referred to, or decided by the tribunal provided in the contract itself.

The material facts of the case were these: In 1856 William P. Schell and S. H. Tate purchased from Frederick Mensch the right and privilege "to dig, take and carry away all such iron ore and other minerals as may be on, in and under that part of a tract of land owned by said Mensch," in Black Valley, Bedford county. By sundry sales and conveyances the title of Mr. Schell became vested in the plaintiffs. In 1872 the plaintiffs held or claimed thirteen tracts of land or ore rights, and timber or surface rights to the balance.

In the same year these plaintiffs granted to defendant, The Kemble Coal and Iron Company, "the exclusive right to

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mine, dig and take away the iron ore" from tracts Nos. 3, 4, 6 and 7, with the right to use timber from No. 7, and also from tract No. 2, for the period of eleven years from April 1, 1872. This agreement was executed May 15th, May 30th, June 11th, and was delivered July 13th, 1872. It required the payment of fifty cents per ton royalty for each and every ton of ore mined and taken, containing a clause compelling the grantors to allow the defendant the option to purchase the properties held by them south of the Juniata river, some twelve tracts, at any time within one year, if defendants saw fit to do so, at and for the sum of $100,000. It also contained a clause in these words: "For the first year of the lease, the parties of the second part are to pay rent on as many tons as they may be able to mine, but for any period of three years thereafter the rent, in the aggregate, is not to be less than $10,000, whether ore to that extent or amount is mined or not, unless the irregularities of the ore vein should, to the satisfaction of the said parties of the first part, prove so great as to prevent the said parties of the second part from taking out ore to that amount, and in case of a difference of opinion between the parties hereto on this point, they are to submit this matter to three disinterested referees to be selected thus: one by the parties of the first part, and one by the said parties of the second part, and the third by the two parties so selected; but should the said parties of the second part pay rent in excess of the ore mined and taken away for any period, they are to have the privilege to take said ore during any after period of and within the said term of eleven years, but not after said term has expired."

Mr. L. T. Watson, the vice-president of the defendant company, during the negotiations which resulted in this agreement, wrote a letter to S. L. Russell, one of the plaintiffs, dated March 23, 1872, wherein he said, "If you will ascertain whether tracts 3, 4, 6 and 7, of the Black Valley lands will be leased together, we taking the risk of your establishing the title to No. 3, I will see what can be done toward getting a railroad."

In 1872 the Huntingdon and Broad Top Railroad was finished and cars were running thereon from Huntingdon to Mt. Dallas. The Bedford and Bridgeport Railroad was finished

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from Mt. Dallas to Bedford, thence to Bridgeport, where it connected with Pittsburgh and Connellsville Railroad, and thence to State line, where it connected with the Cumberland and Pennsylvania Railroad. The Kemble Coal and Iron Company had two furnaces in operation at Riddlesburg, some fourteen miles north of Mt. Dallas. The lands embraced in the agreement were about three miles southeast from Mt. Dallas. The Southern Pennsylvania Railroad was in process of construction, and the lands were near its contemplated and surveyed route. The Bedford and Bridgeport Railroad Company had resolved to build a branch road to these lands. The Pennsylvania Railroad Company owned nearly all the stock and all the bonds of the Bedford and Bridgeport road. Mr. Russell was a stockholder therein, so was the Kemble Coal and Iron Company, and L. T. Watson, vice-president of this company, was a director as well as stockholder. Soon after the execution of the agreement, in 1872, the defendants, finding that the land leased was too high to enable them to reach the ore to advantage, purchased ten acres of adjoining and lower land. Upon this the work of driving a tunnel was at once commenced, and continued vigorously for one year, at a cost of about $5,000. To have reached the ore, they alleged, would have required between three and four years of additional time, and at least $15,000 of expense. In the meantime, defendants, as they averred, having learned that the veins were thin and irregular, and Barndollar and Baughman having given notice that they claimed title to one of the tracts of land embraced in the agreement, and it appearing that this tract contained at least one third of all the ore embraced in the agreement, and that being the portion nearest the railroad and first to be mined, and that no branch railroad was likely to be constructed, ceased operations, and so notified plaintiffs. No counter notice was given and no demand was made for royalty until the fourth year of the lease, when plaintiffs brought this action. The case was reached for trial in January, 1878.

The trial was before HALL, P. J. The following assignments of error, all of which are passed upon by this court, will show the various questions raised in the court below.

1st error. The court erred in their ruling on the fourth

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offer of evidence, as follows: John Fulton on the stand. Defendants proposed to prove by this witness the nature, character, extent and value of the land embraced in the agreement in suit; the difference between the actual location of the ore vein in the ground from that contained on the draft proved by Mr. Russell. Also that at the time of the agreement in suit, and prior thereto, it was a well known fact that a branch railroad was about to be constructed from the railroad then in being at or near Mt. Dallas, to or in the direction of the ores leased. That this fact was well known to defendants; that it was a principal inducement for the execution of the contract; that said branch railroad was not constructed by reason of any fault of defendants. Also the character and distance of the proposed tunnel; and that by no reasonable human agency could ore have been reached prior to the bringing of this suit, and that ore does not exist in the premises in such quantity as to justify mining.

The counsel for the plaintiffs object to the foregoing offer for the reasons following:

1. The testimony is irrelevant to the issue.

2. It is not competent for the defendants to give evidence of rumors as to the construction of a branch railroad.

3. The offer does not allege that the plaintiffs held out the building of a railroad as an inducement to the contract.

4. In the absence of fraud or mistake, the agreement must stand, and can not be contradicted.

5. There is no warranty expressed or implied in the agreement as to the nature, character or extent of the ore veins, and the defendant took the same at its risk.

Per CURIAM. "It is competent to show the non-existence of ore in the land, or that it is in a seam too small for mining; to that extent, evidence admitted. Rumors about building of a branch road with which the plaintiffs were not connected are incompetent. So, also, the representation of the supposed general course of the ore vein on the draft unless there was misrepresentation."

2d error. The court erred in their ruling on the sixth offer of evidence, as follows: L. McDonald on the stand. Defendants propose to prove that in the ground the ore vein is not to be found in one entire tract of land measuring two hundred

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and ten rods, upon or in and through which the vein of ore is represented as passing upon the map proved by Mr. Russell. This to show a mistake calculated to mislead the defendants at the time the agreement was executed. That this is No. 10, and embraced in the offer of lands to defendants at $100,000.

"Objected to for the reason that the tract referred to is not embraced in the lands leased for mining purposes. Rejected, and exception to defendants."

3d error. The court erred in their ruling of the seventh offer of evidence, as follows: William Lauder on the stand. Defendants propose to prove that the agreement in suit was executed by defendants upon the honest conviction and belief (whether correct or erroneous) that the clause relating to the payment of $10,000, in any period of three years, was a mere stipulation, and could be avoided by relinquishing the contract; and that the negotiations which led to the execution of the agreement were all so interpreted and understood by defendants.

PER CURIAM. "The witness having stated that he was not present at any negotiations that led to lease, and had no knowledge of them from plaintiffs or any of them, the offer is rejected and bill sealed to defendants."

4th error. The court erred in ruling on the eighth offer of evidence, as follows: Defendants offer written opinion of Messrs. Hall and Jordan given to Messrs. Barndollar and Baughman, at the time of their contemplated purchase from Frederick Mensch in favor of the Mensch title and adverse to that of plaintiffs. This for the purpose of showing that the title of plaintiffs was not a good marketable title. Objected to as irrelevant.

PER CURIAM. "It is not made to appear upon what statement of facts this opinion is based. Rejected, and exception to defendants."

5th error. The court erred in their answer to defendants' first and second points, as follows:

1st point. That covenants are not to be presumed; that the agreement in suit contained no express covenant to pay $10,000 in any period of three years, and the language of the agreement on that subject is a mere stipulation, which may be

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avoided by abandonment or surrender of the contract by defendants.

2d point. That no action can be sustained for royalty due at the end of four years, except for the price of ore actually mined. Any action for ore not taken can only be sustained after the termination of the entire term.

Ans. "First and second points refused."

6th error. The court erred in answering the sixth, tenth and eleventh points submitted by defendants, as follows:

6th point. That although there may have been no want of good faith on the part of plaintiffs, yet if the defendants placed a construction upon the agreement different from that of the plaintiffs, even if such construction of defendants was erroneous, and in so doing defendants committed a mistake which a fair and reasonable man, under the circumstances, might have fallen into without gross ignorance or supine negligence, then no specific performance of the contract should be enforced, and the verdict should be for defendants.

10th point. A contract may be so inequitable and unjust—may contain so much of hardship on one hand and so small a consideration on the other, as to raise a legal presumption that it was not understood at the time of its execution; and if the jury believe that the defendants made a mistake at the time this agreement was executed, by supposing that they could abandon the mine and thereby avoid liability in case it became impossible to find ore or to reach it if found, then there should be no specific performance of this contract, and the verdict should be for defendants.

11th point. That circumstances and surroundings, as they exist when an agreement is executed, enter into a contract, and this one should not be enforced if entered into by defendants under an actual and honest misunderstanding on a material point.

Ans. "We have answered these points in the general charge. You can not assume that the defendants misconstrued the meaning of the article; the presumption is that they understood the instrument, and there is no evidence we have heard to the contrary."

7th error. The court erred in their answer to the seventh point of defendants, as follows: That in proportion to the se-

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verity of the terms imposed by the one party upon the other, it becomes incumbent on the former to see that the terms are explicitly stated. If the plaintiffs have used terms in the agreement which are reasonably capable of misconstruction, then the defendants may construe them in the manner most advantageous to the company.

Ans. "This has no application to the case."

8th error. The court erred in omitting entirely to answer defendants' ninth point, which was as follows: That specific performance of a contract should not be decreed where it was executed by either party under an honest mistake, even though such mistake was not caused by the other party, nor unless it is strictly equitable so do so, nor where the bargain is hard, unequal, unjust or oppressive; nor where it will operate in a manner different from that which was in contemplation of the parties at the time when it was executed.

9th error. The court erred in their answer to defendants' twelfth point, which point and answer were as follows:

12th point. If the jury believe that the defendants executed the agreement in suit under the impression and belief that a branch railroad would soon thereafter be constructed, from the railroad then existing to some point at or near the iron ores granted in the agreement, and that this belief was a principal inducement to the execution of such contract—that such branch railroad was not constructed, by reason of unforeseen causes, then the contract is inoperative and invalid, and the verdict should be for defendants.

Ans. "We have answered this in the general charge. Nor, if Mr. Watson had a project for getting a branch railroad, with which the plaintiffs were not connected in any way, either in fact or by making representations in the negotiations of the contract, would that entitle them to relief. Was a branch road promised by plaintiffs, which has not been built, or did they hold out any inducement of a road in any way? Did the evidence establish this? You can not find it on the assertion or argument of counsel, unless there is evidence of it."

10th error. The court erred in their answer to defendants' fourteenth point, as follows: That if the jury believe that in September, 1873, defendants ceased all operations, and that this fact was then or soon after made known to plaintiffs, and

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that no royalty was demanded or paid before March, 1876, then they have a right to presume that the contract was ended by the mutual consent of the parties.

Ans. "Refused."

11th error. The court erred in their answer to defendants' 15th and 16th points, which points and answer were as follows:

15th. That the agreement of Frederick Mensch with S. H. Tate and William P. Schell, dated February 8, 1856, does not convey title to the iron ore contained in the land therein described; that equity will not now decree a specific performance of that contract; that the title of plaintiffs to that tract of land (106 acres), and the iron ore therein, was and is radically defective, and if the jury believe that this property was and is material to defendants, then there should be no decree for performance, and the verdict should be for defendants.

16th. That the evidence in the case established the fact that the title of plaintiffs to the Fred Mensch tract is not a marketable title; that it is surrounded with doubts and uncertainties sufficient to prevent a decree of specific performance, and therefore the verdict should be for defendants.

Ans. "We reserve these points to be determined, if necessary, on a motion for a new trial. If you find that the defendants had full knowledge of the difficulties with regard to the Mensch title, and took it at their own risk, we will not have to determine these points; there could be no time now to do so without great inconvenience and delay to other suits. You may make a special finding on this point. You can say whether you find it affirmatively or negatively; that he did purchase with knowledge and at his own risk, or that he did not; if not, then was that tract essential to the contract, and did the purchasers fail to pay the balance of the purchase money?

12th error. The court erred in their answer to defendants' seventeenth point, which point and answer were as follows: That the letter of L. T. Watson, Esq., of March 23, 1872, to Hon. S. L. Russell, does not establish the position that defendants took the risk of title to tract No. 3. No such provision is contained in the agreement itself, which is the consummation of the contract; besides there is no evidence

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that plaintiffs ever did anything thereafter to establish the title to said tract No. 3.

Ans. "The letter of Mr. Watson, the vice-president, is dated 23d March, 1872; the contract was consummated soon after. It is not a contradiction of the articles. If in fact the contract was consummated on the basis of the letter, then the defendants would be bound by the offer of Mr. Watson in the letter."

13th error. The court erred in their answer to plaintiffs' second point, as follows: That said agreement having been put upon record on the 7th day of September, 1865, prior to the conveyance by Mensch to Baughman and Barndollar, of the date of November, 14, 1871, they, Barndollar and Baughman, took the same subject to whatever rights Tate and Schell had under such agreement.

Ans. "Affirmed."

14th error. The court erred in their answer to the third point of plaintiffs below, which point and answer were as follows: That if L. T. Watson was the person who negotiated the lease with plaintiffs, had knowledge of the alleged defect of title of the plaintiffs in the Mensch tract, and accepted the terms of the lease, agreeing to take the risk of the title thereto, then the defendants can not set up said alleged defective title as a defense in this case.

Ans. "Affirmed."

15th error. In answering the 4th and 6th points of defendants, the court erred in using the following language: "And (if) the iron ore is there and in sufficient quantity, and not affected by irregularities so as to prevent taking out 20,000 tons, the verdict should be for the plaintiffs for $10,000, with interest from the time it fell due, provided you find the defendants took tract No. 3, at their own risk."

16th error. The court erred in not affirming the fourth point of defendants below, and directing a verdict for defendants. Said fourth point was in these words: "That all the evidence in the case does not present such a state of facts and circumstances as would move a chancellor to decree a specific performance of the contract in suit, and therefore the verdict should be for defendants."

The verdict was for the plaintiffs, for $11,075, "and that

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defendants took the Mensch tract with knowledge of the title and at their own risk." A motion for a new trial was refused, and judgment entered on the verdict. The defendants then took this writ, alleging that the court erred, as set forth in the foregoing assignments of error.

JOHN CESSNA, for plaintiff in error.—The contract upon which suit was brought was certainly executory, at least on the part of defendants, and we were therefore entitled to show any facts and circumstances at the time of its execution, such as would avoid it or justify a court of equity in granting us relief. The court should, therefore, have admitted the evidence offered: *Ley* v. *Huber*, 3 Watts, 367; *Horbach* v. *Gray*, 8 Watts, 492; *Case* v. *Cushman*, 3 W. & S. 546; *Philadelphia Ins. Co.* v. *Am. Life & Health Ins. Co.*, 11 Harris, 65; *Miles* v. *Stevens*, 3 Barr, 21; *Boynton* v. *Hazelboom*, 14 Allen, 107. This contract was a license, not a lease: *Doe* v. *Wood*, 2 B. & Ald. 724; *Johnstown Co.* v. *Cambria Co.*, 8 Casey, 246; *Huff* v. *McCauley*, 3 P. F. Smith, 206; *Funk* v. *Haldeman*, Id. 229; *Gloninger* v. *Franklin Coal Co.*, 5 Id, 9; *Dark* v. *Johnston*, Id. 164. The court erred as alleged in the sixth, seventh, eighth and ninth assignments of error. Equity is a part of the law of Pennsylvania, and courts of law enforce equitable principles in actions of debt, assumpsit, covenant and ejectment: *Williams* v. *Bentley*, 3 Casey, 294; *Nicol* v. *Carr*, 11 Id. 381; *Piersoll* v. *Neill*, 13 P. F. Smith, 420; *Graver* v. *Scott*, 30 Id. 88. Execution of a contract will not be decreed where there was a clear mistake of fact. A marketable title was indispensable. A defect in the title of any one of the tracts defeated the right to recover. No royalty was ever paid, nor any demand ever made therefor. From this conduct of the parties it was to be presumed that the contract was ended by mutual consent. The lease was the consummation of the contract. It contained a covenant for title and its binding force could not be weakened by the letter of Mr. Wattson, and there was no evidence that his knowledge as to the defect in the title to No. 3 was ever communicated to defendants or that he had authority to assume any risks. The plaintiffs should not have been permitted to recover the price of the ore in those lands unless they showed they were the rightful owners.

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RUSSELL & LONGENECKER and W. H. KOONTZ, for defendants in error.—The contract was not a mere license, but the grant of a right: *Moore* v. *Miller*, 8 Barr, 283; *Clement* v. *Youngman*, 4 Wright, 345; *Johnston* v. *Cowan*, 9 P. F. Smith, 280; *Caldwell* v. *Fulton*, 7 Casey, 480; *Harlan et al.* v. *The Lehigh Coal and Navigation Co.*, 11 Id. 289; *Funk* v. *Haldeman*, 3 P. F. Smith, 243. The defendants were bound to pay for the ore whether mined or not: *Fisher* v. *Milliken*, 8 Barr, 111; *Powell* v. *Burroughs*, 4 P. F. Smith, 329; *Johnston* v. *Cowan*, 9 Id. 280.

The evidence as to matters antecedent or subsequent to the lease did not constitute such a defense as would relieve the defendants from liability. The assignments of error as to the marketable character of the title are all cured by the finding of the jury that the defendant "took the Mensch tract with knowledge of the title and at their own risk." Under the evidence the jury could not presume that the contract was ended by mutual consent. There was not evidence to show that defendant did not understand the agreement or made any mistake in supposing that the mine could be abandoned, or that the contract was entered into in view of the contemplated railroad. There was no state of facts such as would warrant a chancellor in releasing defendants from their contract.

A re-argument was subsequently ordered, and the case was again heard on May 15, 1879, before SHARSWOOD, C. J., MERCUR, GORDON, TRUNKEY and STERRETT, JJ. WOODWARD and PAXSON, JJ., absent.

JOHN CESSNA, for plaintiff in error.

We rely upon our paper book and argument for 1878. In our fourth point we asked that the case might be taken from the jury, because the plaintiffs closed their case without offering any evidence of title. Defendants pleaded want of title in plaintiffs. This was a traverse of their averment of performance and readiness to perform. In such an issue it was essential they should prove title: *Negley* v. *Lindsay*, 17 P. F. Smith, 217; *Heron* v. *Hoffner*, 3 Rawle, 400; *Smith* v. *Webster*, 2 Watts, 478. Instead of compelling the plaintiffs to show title, the court permitted the jury to find that we had

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agreed to run the risk of title on the evidence contained in the letter of Mr. Watson. The admission of this evidence and the instruction of the court thereon, were manifestly wrong. The letter was not cotemporary with the agreement, but antedated it some time, and was clearly inadmissible to vary the legal effect of a contract under seal.

L. W. HALL, for defendants in error.

The words used in the agreement are "grant, let and lease." These words do not imply anything more than a covenant for quiet enjoyment: *Maule* v. *Ashmead*, 8 Harris, 482. If there was defect of title in tract No. 3, Watson, vice-president of the Kemble Coal and Iron Company, and the party who acted for them from the beginning to the end of this whole transaction, had full knowledge of it. This is shown by his letter to Mr. Russell, dated Philadelphia, March 23, 1872, wherein he asks, "Whether tracts three, four, six and seven Black Valley lands, will be leased together, we taking the risk of your establishing title to No. 3." The lease was shortly afterward drawn by Watson, including tracts Nos. 3, 4, 6 and 7, "being contiguous tracts on the west side of Black Valley," and it was sent by Watson to New York for execution. Whatever covenant may have been contained in the words above quoted was only an implied one. Where the lessee has notice of the defect of title, the implied covenant is rebutted.

A motion for a re-argument was again made, but refused.

Chief Justice SHARSWOOD delivered the opinion of the court, May 26, 1879.

The agreement of May 30, 1872, between the parties to this action, was not an executory but an executed contract. It was not an agreement that a lease should be made at a future time, but a present lease, by the most apt and formal words, "grant, let and lease" for the term of eleven years from the 1st of April, 1872, of "the exclusive right to mine, dig and take away the iron ore from four tracts of land in Black Valley, West Providence township, in the county of Bedford," "also the right to make tramroads, erect machinery, open tunnels, deposit dirt, and to do all things necessary and appertaining to the mining of the said ore." In consideration

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the lessees, the Kemble Coal and Iron Company, bound themselves and their successors to pay to the lessors, their heirs or assigns, on the fifteenth day of each month, fifty cents per ton of 2,240 pounds for each and every ton of ore mined and taken away the month previous. It was provided that for the first year of the lease, the lessees were to pay rent on as many tons as they might be able to mine, but for any period of three years thereafter the rent in the aggregate was not to be less than $10,000, whether ore to that extent or amount was mined or not. The lease was executed by the lessors under their respective seals, and by the lessees under their corporate seal duly attested by their president and secretary, acknowledged by the several parties, and recorded July 13, 1872. Under it the lessees had the unquestionable and unquestioned right to enter upon the four tracts of land mentioned, and to commence to mine and take away the coal. It was a grant of the ore in place. This was an action at the end of four years to recover the $10,000 for the last three years, under the express covenant to that effect contained in the lease. Clearly then it was not a case in which the equitable rules and principles adopted in bills for specific performance by courts of chancery have any application. That there was iron ore in the tracts, a subject-matter upon which the lease could operate, was not controverted. The learned judge in the court below, in his ruling on the fourth offer of evidence, and in his answers to the fourth and sixth points in the fifteenth error, expressly decided that it was competent for the defendants to show the non-existence of ore in the land or that it was in a seam too small for mining, or effected by irregularities so as to prevent taking out 20,000 tons. It follows that the learned judge below was entirely right in his answers to the sixth, tenth and eleventh points of the defendants below, complained of in the sixth assignment of error; in his answer to the seventh point complained of in the seventh assignment; in the answer to the ninth point in the eighth error, and in refusing to affirm the defendants' fourth point, as complained of in the sixteenth assignment. This last dated point was "that all the evidence in the case does not present such a state of facts and circumstances as would move a chancellor to decree a specific performance of the contract in suit, and therefore the verdict should be for

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defendants." All these points were based on the assumption that this action was brought for the specific execution of an executory contract for a lease, and not for rent due upon a lease actually executed. Much reliance is placed by the plaintiffs in error upon the decision of this court in *Miles* v. *Stevens*, 3 Barr, 21. But that was an action brought to recover the purchase money covenanted to be paid in articles for the sale of land. It was therefore in effect a bill by the vendor to compel the specific performance of a mere executory agreement to sell, and it was held accordingly that where such a contract is made under a mistake or in ignorance of a material fact, it is relievable in equity.

The evidence offered and rejected, which forms the subjects of the first, second and third assignments, was clearly irrelevant and rightly rejected. It was not offered to be proved that any representations were made by the lessors as to the construction of any railroad; or that the building of any such road was held out by the lessors as an inducement to the execution of the lease. The fact that an ore vein was not found in one entire tract, as represented in the map, was immaterial, because it was not embraced in the four tracts leased for mining purposes, but in the lands of which the defendants had the option to purchase, an entirely distinct and independent agreement. William Lauder, by whom the offer was made to prove that the lessees executed the lease under the honest conviction that the clause relating to the payment of $10,000 in any period of three years was a mere stipulation, and could be avoided by relinquishing the contract, stated that he was not present at any negotiations which led to the lease, and had no knowledge of them from the lessors or any of them. The refusal of the court to affirm the first and second points of the defendants was unquestionably right. The covenant in the lease was express that for any period of three years after the first year, the rent in the aggregate was not to be less than $10,000, and there is not a word to support the idea that it was a mere stipulation which might be avoided by abandonment or surrender of the contract by the lessees, or that it was not payable until after the expiration of the entire term. Nor would the court have been justified on any principle in instructing the jury as they were asked to do in the

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fourteenth point, that if the defendants ceased all operations in September, 1873, and no royalty was demanded or paid before March, 1876, they might presume that the contract was ended by the mutual consent of the parties. This forms the subject of the tenth error assigned.

The remaining assignments—the fourth, eleventh, twelfth, thirteenth and fourteenth—relate to the alleged defect in the title of the lessors. Without stopping to inquire whether anything short of an eviction from all or part of the demised premises can be a defense by a lessee to an action for the rent, it was submitted to the jury to say whether the lessees did not know of the alleged defect and took the risk of it. The jury found "that defendants took the Mensch tract with knowledge of the title and at its own risk," and we think the evidence upon which this question was submitted to them was ample.

Having thus examined all the sixteen assignments, and finding no error of which the plaintiffs have any right to complain,

Judgment affirmed.

McDOWELL ET AL. v. HENDRIX, EXECUTOR.

(67 Indiana, 513. Supreme Court, 1879.)

Action for royalties by executor. The executor and not the heir is the proper party plaintiff in an action to recover rents or royalties which fell due before the decease of the lessor.

Abandonment by lessee must be pleaded. A lease of coal lands provided that if no coal were found and the lease was for that cause abandoned, no payments need be made: *Held*, that such defense must be set up in the answer and need not be negatived in the complaint.

[1] **Assignee.** An assignee is jointly liable for rent with the lessee.

[2] **Lease entered into after "drilling"—Unexpected encounter with "horsebacks"—Minimum rent.** The answer averred that both parties went into the lease upon the result of experiments by drilling; that such drilling indicated a vein four feet thick and free from obstructions; that actual mining developed a vein only three feet thick and full of "horsebacks" and "troubles." The lease had provided a minimum rent with a clause conceding release from payments in case no coal were found, in which contingency lessee could abandon. *Held*, that the de-

[1] *Fisher* v. *Milliken*, 8 M. R. 395.

[2] *Phillips* v. *Jones*, 8 M. R. 344; *Bell* v. *Truit*, 8 M. R. 649.

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velopments stated were no ground for relief, and that defendants must pay the minimum rent and could not set up abandonment so long as they continued in possession.

Threat to foreclose on previous mortgage is clearly no defense in action for rent against lessee.

From the Clay Circuit Court.

S. W. CURTIS and E. S. HOLLIDAY, for appellants.

G. A. KNIGHT, C. H. KNIGHT and I. M. COMPTON, for appellee.

HOWK, C. J.

In this action the appellee sued the appellants, and one Robert McBeth, for the recovery of certain money claimed to be due and unpaid, under a written lease executed by and between the appellee's testator, John Hendrix, in his lifetime, and said Robert McBeth.

To the appellee's complaint the appellants demurred, for the alleged insufficiency of the facts therein to constitute a cause of action; which demurrer was overruled by the court, and to this ruling they excepted. They then answered in four paragraphs, to the second and fourth paragraphs of which answer the appellee's demurrer, for the alleged want of sufficient facts therein, was sustained by the court, and to this decision the appellants excepted. To the other affirmative paragraph of said answer the appellee replied, putting the case at issue.

The cause was tried by the court, and a finding was made for the appellee, assessing his damages in the sum of nine hundred and seventy-five dollars; for which sum the court rendered the judgment from which this appeal is now prosecuted.

In this court the appellants have assigned, as errors, the following decisions of the court below:

1. In overruling their demurrer to the appellee's complaint, and,

2. In sustaining appellee's demurrer to the second and fourth paragraphs of their answer.

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We will consider and decide the questions presented by these alleged errors, in the order of their assignment.

1. In this complaint the appellee alleged, in substance, that on the 20th day of May, 1873, his testator, then in life, entered into a written agreement, or lease, with the defendant McBeth, by the terms of which said testator granted, demised and let to said McBeth, the real estate therein described, for the sole purpose of digging, mining and removing the coal thereunder, for the term of twenty years therefrom; that by the terms of said lease, a copy of which was filed with said complaint, said McBeth agreed to pay said testator at the rate of thirty cents per ton of two thousand one hundred and fifty pounds, for all coal mined which passed over and was retained by a screen with meshes from three fourths to one inch—said payments to be made monthly; that said lease contained the further stipulation, that, "after the expiration of the first year from this date, said second party agrees to pay said first party, during each and every year, the sum of two thousand dollars, whether said rent on coal dug and mined shall amount to said sum or not, and said annual sums shall be deducted out of rent of coal, provided said rent shall exceed said sum so as above agreed to be paid annually;" that said McBeth afterward entered upon said land, and sunk a shaft and began to dig and mine said coal, and afterward assigned an interest in said lease to his co-defendants, the appellants in this court, a copy of which assignment could not be given for the reason that the appellants had possession thereof; that from May 20, 1874, to May 20, 1875, the appellants and McBeth dug and mined enough coal to make the royalty thereon amount to one thousand one hundred and fifty dollars, which sum they paid said testator, leaving due and unpaid of said annuity of two thousand dollars, provided to be paid each year, the sum of eight hundred and fifty dollars, which they failed and refused to pay, although the appellee had, before the commencement of this suit, demanded payment thereof; and that the appellee's testator, John Hendrix, had died testate on the 25th day of August, 1875, and the appellee had been duly and legally appointed and qualified executor of his will.

Wherefore, etc.,

The objections of the appellants' counsel to the sufficiency of

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the appellee's complaint seem to be founded, in part at least, upon a stipulation in the written lease, upon which the suit was brought, to the effect that "If no coal is found under said land, and this lease is abandoned for that reason, then said payments are not to be made, or, if made, the same shall be refunded." It is claimed by counsel, as we understand them, that the complaint was and is bad, on the demurrer thereto, for the want of facts, because it was not alleged therein that the appellants had continued in the possession of the demised premises during the year mentioned in the complaint, and had not abandoned the lease for the reason that no coal had been found under said premises. It seems to us, however, that if the appellants had abandoned the lease for the reason given, that fact would have been purely and simply a matter of defense to be shown by them, and that it was not necessary for the appellee to negative that fact in his complaint, in order to show a good cause of action.

Appellants' counsel also claim that the complaint did not show a cause of action in the appellee as executor, because, as they say, the lease in suit "runs with the land, and the proceeds belong to the heirs, and not to the executor." On this point we have been referred by counsel to the recent case of *Hendrix* v. *Hendrix*, 65 Ind. 329; but the case cited does not seem to us to have much bearing upon the question for decision in the case now before us, and none at all in favor of the position assumed by counsel in this case.

In that case it was expressly stated in the opinion of the court that the rents and royalties collected by the executor had accrued after the death of the testator, and it was properly held that the executor, as such, had no lawful right to collect such rents and royalties, and therefore could not lawfully charge his testator's estate with the moneys collected by him on that account. But, in the case at bar, it clearly appeared from the allegations of his complaint that the appellee, as executor, sued for the recovery of rent and royalty, which had matured and become due on the 20th day of May, 1875, and that his testator did not die for more than three months thereafter, to wit, on the 25th day of August, 1875. It is very clear, we think, that whatever rent or royalty had matured and become due under the lease in suit, in the life-

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time of the appellee's testator, would go to the appellee, as executor, and not to the heirs at law or the devisees of the decedent: *King* v. *Anderson*, 20 Ind. 385.

It is further said by the appellants' counsel, in their brief of this case, that as it is not averred in appellee's complaint that the appellants "promised to pay this annuity, it seems quite beyond our views of legal liability to understand how they can be sued upon a contract which they never made, and never promised to perform, and never derived any benefit from." Elsewhere in their brief, the same learned counsel have conceded, or rather claimed, that "this lease, as shown by the complaint, runs with the land." It is alleged in the complaint that the lessee, McBeth, had assigned to the appellants an interest in this lease which "runs with the land," and that they and McBeth had, during the year mentioned in the complaint, dug and mined coal on the demised premises, and had paid a part of the royalty or annuity due for that year. Under the allegations of the complaint it seems to us that the appellants, as the assignees of the lease, whose covenants run with the land, were clearly liable for the rent of the demised premises due and unpaid for the year mentioned in the complaint. The assignees of the lessee are liable to the lessor, his representatives or assigns, for the rent of the demised premises for and during the time such assignees hold said premises, according to the terms and covenants of the lease; "for though there is no privity of contract, there is a privity of estate which creates a debt for the rent." *Howland* v. *Coffin*, 9 Pick. 52; *Gordon* v. *George*, 12 Ind. 408; *Carley* v. *Lewis*, 24 Ind. 23; Taylor's L. & T. §§ 436 to 454, inclusive.

In our opinion the court did not err in overruling the appellants' demurrer to the appellee's complaint.

2. In the second paragraph of their answer, the appellants alleged, in substance, that after the execution of the lease mentioned in appellee's complaint, and before any work had been done thereunder, they acquired an interest in said lease jointly with their co-defendant, McBeth; that before the execution of said lease, the land described therein had been thoroughly drilled and tested in the manner generally used, to ascertain the existence, quality and extent of coal deposits under and by the directions of the lessor, John Hendrix, Sr.;

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that said drilling and tests indicated the existence of coal, as exhibited to the appellants by said lessor, under said land, in large quantities and in excellent condition, the said drilling having passed through the veins of coal where they were the thickest and in the best condition, and where said coal was freest from imperfections, and where there were the least obstacles in the way of mining said coal; that at the time of the execution of said lease the parties thereto believed, for the reasons stated, that said land contained large deposits of coal; that the same was in excellent condition and could be easily worked, and that the veins thereunder were at least four feet thick and free from obstructions, and with proper appliances and reasonable diligence the lessee could mine from said land a sufficient quantity of coal each year to make the royalty thereon amount to two thousand dollars; that the lease was entered into and executed under that impression and belief by all the parties thereto; that the parties thereto had no means of ascertaining the extent and quality of said coal deposits, other than those above mentioned; that when the appellants acquired their said interest in said lease, they knew of said drillings and tests, and each of the parties to said lease believing that they indicated the real condition and extent of the coal deposits, and having no other information or knowledge in regard to said coal, they were induced to, and did acquire their said interest therein; that, pursuant to said lease, they opened a mine on said land and began to excavate and mine coal; that they extended the openings and entries in said mine as far and as fast as the peculiar condition of the ground and coal formations would permit; that since the time, mentioned in the lease, when an annual royalty of two thousand dollars should thereafter be paid, they had continuously operated said mine up to its full capacity, and had extended and increased it as rapidly as they possibly could, but that the quality and condition of coal in said land were not such as were indicated by said drillings and tests; that the average thickness of the coal veins did not exceed three feet instead of four feet, as indicated; that, contrary to the expectations of the parties to the lease, the coal in said mine was difficult to work, for the reason that it abounded in obstructions, usually known as "horsebacks" and "troubles," all of which were unknown to the parties thereto; that said

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coal veins were very irregular and full of inequalities, being sometimes cut in two by deposits of earth and slate which must be removed at great labor and expense; that by reason of the limited quantities of coal in said land, and the difficulty as stated of mining the same, it was impossible to mine from said land a sufficient quantity of coal for the royalty thereon to amount to two thousand dollars, at the price stipulated in the contract under which the appellants were working; that all the parties to the lease relied solely upon the indications of the quality and quantity of the coal underlying said land, from the tests so made, and made said contract in the full belief that said amount of coal could be easily mined, and that such mistake was the mutual mistake as to the facts; and they alleged that said contract would never have been executed had not the parties thereto been misled as aforesaid; and the appellants averred that the coal deposits in said land were nearly exhausted; that the difficulties of mining the same were constantly increasing, and that it would be absolutely impossible for them, or any other persons, to take from said land, at any time, the coal for which royalty was demanded in appellee's complaint, in addition to the amount required by the terms of said lease to be taken out every year, and that they had already paid for all coal underlying said land. Wherefore they asked that they might be released from said contract to the extent that the consideration had failed, and for other proper relief.

We have given the appellants the benefit of a full statement of the facts alleged and relied upon by them in the second paragraph of their answer, but we can not avoid the conclusion that these facts were and are utterly insufficient to constitute a valid defense in their behalf to appellee's action. The appellants admit, in this paragraph of answer, that after the execution of the lease in suit they acquired an interest therein from the lessee, McBeth, jointly with him, before any work had been done thereunder; and that, pursuant to said lease, they had opened a mine on the land demised and had begun to excavate and mine coal.

As the assignees of McBeth they entered with him, under his lease, into the possession of said land for the purposes expressed in said lease. While they continue in the use and occupation of said land under said lease they are liable to the

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lessor, or those claiming under him, for the rents or royalties reserved in such lease, according to the terms thereof; and they can escape such liability in no other way or manner except by the abandonment or surrender of the possession of the demised premises. The gist of this second paragraph of answer would seem to be that the contract of the lessee for the payment of rent or royalty was a hard one and difficult to be performed, or, as the appellants aver, "that it will be absolutely impossible for them, or any other persons, to take from said land, at any time, the coal for which royalty is demanded in plaintiff's complaint." It is clear, we think, that this alleged impossibility to take from the land sufficient coal to make the royalty demanded, and for which the appellants were liable as assignees of the lessee, would constitute no defense whatever in their favor so long as they continued in possession of the land. Thus, in the case of *Gowan* v. *Christie*, 5 Moak, 114, it was held, in substance, that the lessee of a mine, although he might rely on the "being or existence" of the coal or other mineral, takes all risk, either as to its quantity or value, unless either is expressly warranted; and that at common law the mere fact of the "unworkability to profit" of a mine afforded no ground for reducing or throwing up a lease of minerals which were, in their nature, subject to many vicissitudes, and there being, in such a case, no legal warranty on which the lessee could rely. See, also, on the point under consideration, the case of *Clifford* v. *Watts*, Law Rep. 5, C. P., 577, wherein it was said, that where a man may have contracted to do something which, in the present state of scientific knowledge, might be utterly impossible, and yet have so contracted as to warrant the possibility of its performance by means of some new discovery, or be liable in damages for the non-performance, he could not set up, by way of defense, that the thing to be done was impossible. In the case last cited, Willes, J., said: "Where a thing becomes impossible of performance by the act of a third person, or even by the act of God, its impossibility affords no excuse for its non-performance; it is the defendant's own folly that has led him to make such a bargain, without providing against the possible contingency." *Paradine* v. *Jane*, Aleyn, 26; *Barker* v. *Hodgson*, 3 M. & S., 267; *Hills* v. *Sughrue*, 15 M. & W. 253.

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It seems to us, however, that the question of the absolute impossibility to perform the covenant in suit is not shown in this case, either by the covenant itself, or by any of the averments of the second paragraph of the appellant's answer. The covenant itself reads as follows: "After the expiration of the first year from this date" (the date of the lease) "said second party agrees to pay said first party, during each and every year, the sum of two thousand dollars, whether said rent, on coal dug and mined, shall amount to said sum or not, and said annual sums shall be deducted out of rent of coal, provided said rent shall exceed said sum so as above agreed to be paid annually." The fair construction of this covenant, taken in connection with the other provisions of the lease, is that the lessee, McBeth, thereby agreed that after the first year of the lease he would pay a *minimum* annual rental, for the demised premises, of two thousand dollars, in any event, and no more unless the number of tons of coal mined in any year, at thirty cents per ton, should make an aggregate sum in excess of said minimum rent or royalty, in which event he would also pay such excess.

The impossibility to perform this contract which is relied upon by the appellants in the second paragraph of their answer, as a defense to this suit, is the alleged impossibility to excavate and mine, from the land demised, a sufficient number of tons of coal, at thirty cents per ton, in any one year, to make an aggregate sum equal to such minimum rent or royalty of two thousand dollars, which the lessee agreed should be paid during each and every year, whether the coal dug and mined at thirty cents per ton should amount to that sum or not.

Upon the question now under consideration, it seems to us that the case of *The Marquis of Bute* v. *Thompson*, 13 M. & W. 487, is directly in point. In that case, as in this, the lessee had agreed to pay the lessor a certain sum per ton for each ton of coal mined, and had further agreed that he would pay a fixed sum each year as fixed rent, whether the coal should be worked or not; and the lessee having failed to raise the quantity of coal which, at the agreed price per ton, would amount to the fixed rent, he was held bound at all events, to pay such fixed rent. POLLOCK, C. B. said:

"We are of opinion that this stipulation for a fixed rent,

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coupled with a covenant that coal should be wrought to that extent, and if above it, that there should be a payment of 9*d.* for each ton over and above, does not carry with it, by any implication, a condition that there shall be coals to that amount capable of being wrought. It appears to us to be a stipulation on the part of the defendants that they would work and get that quantity, and that if they did not get it, they would pay a fixed rent to the landlord; and we can not import into that covenant a condition that there should be coals to that extent. If that was the intention of the parties, they should so have expressed it."

In the case at bar, the lessee virtually said to the lessor, in and by the covenant above quoted, "If you will execute this lease to me, I will pay you an annual rent or royalty of two thousand dollars for each and every year, after the first year, whether the coals dug and mined by me, at thirty cents per ton, shall amount to that sum or not." It is certainly not impossible for the appellants to perform this contract, and while they continue in the possession of the land demised, as the assignees of the lessee, we think they must be held bound to such performance to the extent of the payment of such minimum rent or royalty, according to the terms of the lease. *Mellers* v. *The Duke of Devonshire*, 16 Beav. 252; *Powell* v. *Burroughs*, 54 Pa. St. 329; Blanchard & Weeks' Leading Cases on Mines, p. 426 *et seq.*

We think, therefore, that no error was committed by the court below in sustaining the appellee's demurrer to the second paragraph of the appellants' answer in this case.

3. In the fourth paragraph of their answer the appellants alleged in substance that the land demised, prior to the execution of the lease in suit, had been mortgaged to ——— Insurance Company for a large sum of money, but by whom it was mortgaged, or to what insurance company, they apparently forgot to allege; and, further, they said that the mortgage was due, the estate of the appellee's testator was probably insolvent, and the holders of the mortgage were threatening to foreclose it. These facts were so clearly insufficient to constitute a defense to appellee's action that the appellants' counsel, in their elaborate briefs of this cause, have not discussed the alleged error of the court in sustaining

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appellee's demurrer to the fourth paragraph of answer. The supposed error might, therefore, be regarded as waived; but whether waived or not, we think that the court did not err in sustaining the demurrer to this paragraph of answer.

We find no error in the record.

The judgment is affirmed, at the appellants' costs.

THE WILMINGTON STAR MINING CO. ET AL. v. ALLEN ET AL.

(95 Illinois, 288. Supreme Court, 1880.)

Lessee not relieved in equity after forfeiture. Where a written lease of a coal mine required the lessee to prosecute mining for coal without interruption and forbade assignment without consent, and provided for forfeiture in case of breach, and the lessor had accordingly entered for manifest breaches, both as to working and assignment: *Held*, that the prayer of the receiver of the assignee of the lease to be restored to possession was properly denied.

Court instructing receiver. The circuit court may properly instruct a receiver as to the management of property, upon petition filed by him in the suit in which he is appointed, against others claiming the property, and if the rights of such other parties are established there is no error in ordering the receiver not to disturb their possession until the further order of the court upon the dismissal of the petition.

Discretion of court where a going mine is in litigation. Where property of an insolvent corporation is in the hands of a receiver, bills brought by and against him may all be regarded as applications to the court having jurisdiction over the receiver and the business, respecting the administration and management of the property; and where leasehold interests are involved, depending for their preservation upon continuing the operations of a mine, whether it should be kept going is a matter of business economy as well as of law; the jurisdiction in such cases is largely discretionary and will not be interfered with, short of a case of flagrant error or injustice.

[1] **Estoppel, after virtual surrender, to demand possession.** Where a lessor, after serving notice to test his right to a forfeiture, had commenced proceedings to such effect, and after sundry interlocutory orders had been made, the attorney of the receiver holding the tenant's interest informed the lessor that they would not be contested further, and told the lessor to take possession, which he did, leasing the property to another who made expenditures in preparing to resume work, it was *Held*, that after such abandonment and surrender of possession and

[1] *Stewart* v. *Munford*, 5 M. R. 555.

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action under it the receiver was estopped to retract such virtual surrender of the lease.

Perpetual decree, on prayer for temporary relief. Under a prayer to enjoin the removal of mining machinery, etc., until the further order of the court pending proceedings to determine the forfeiture of the lease, the court may, on the hearing, make the order *perpetual* if satisfied there never should be any further order to the contrary.

Decree on the entire pleadings. Where a bill, cross-bill, petition and answer thereto, relating to the same subject-matter, are consolidated and heard together and a decree rendered, it will be considered as made in view of all the allegations contained in all the pleadings, although the petition and cross-bill may have been dismissed on the hearing.

Writ of error to the Appellate Court for the Second District.

Messrs. GARDNER & SCHUYLER, for the plaintiffs in error.

Mr. G. D. A. PARKS and Messrs. MUNN & MUNN, for the defendants in error.

Messrs. ISHAM & LINCOLN, for the defendants in error, Ezra B. McCagg, Robert T. Lincoln and Edmund Allen.

Mr. Justice SHELDON delivered the opinion of the court.

The case presented by the records respects two separate and distinct coal mining leases, claimed to have belonged, at the date of the controversy, to the Wilmington Star Mining Company of Coal City, by assignment from the lessees, respectively; one executed in 1870, by Ezra B. McCagg and John Forsythe, to Alexander Crombie, of the northeast quarter of section 8, and the west half of the southwest quarter of section 9, township 32 north, range 9 east, in Will county; the other executed in 1871, by Edmund Allen to Henry E. Hamilton, of the west half of the southwest quarter of section 5, in the same township and range.

In a suit of Bacon Wheeler against this mining company, in the Circuit Court of Will County, Milford D. Buchanan had, on the 15th day of March, 1878, been appointed receiver of the goods and chattels of said company, and of its real estate.

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On the 20th day of April, 1878, Allen, as landlord of the west half of the southwest quarter of section 5, filed a bill in chancery in said circuit court against the company and Buchanan, its receiver, alleging that the company's mining lease from Allen had been forfeited, and praying for an injunction to restrain the taking away of certain coal-mining machinery. A temporary injunction was granted. The company and the receiver answered, and filed a cross-bill against Allen, praying for an injunction to restrain him from taking possession of the land. A temporary injunction was granted on the cross-bill, and afterward dissolved on motion.

Buchanan, the receiver, then, on the 23d day of September, 1878, filed in said court, in the suit of Bacon Wheeler against this company, wherein Buchanan had been appointed receiver, his petition, averring that the company owned the Allen lease, and also owned the lease from McCagg and Forsythe to Crombie of the northeast quarter of section 8, and the west half of the southwest quarter of section 9, and that on the McCagg and Forsythe land there was a railroad track. He avers that the company had ceased mining on the McCagg and Forsythe land prior to his appointment as receiver; that on July 14, 1878, Allen took possession of the railroad track on the McCagg and Forsythe land, and also forcibly ejected the receiver's employees from the Allen land, and that Baird, Hickox & Co., as tenants of Allen, are in possession of the Allen land.

The petition prays that the estate in the petitioner's hands may be protected and preserved; that Allen, Baird, Hickox & Co., and all persons claiming under them, be ordered to surrender to petitioner possession and control of said real estate, and restore to petitioner the rights and privileges held by him as such receiver by virtue of said leases, and to deliver up to petitioner as such receiver all the personal property which belonged to said receiver, and that all the rights of the receiver might continue as when he accepted the trust, and that said Allen, and Baird, Hickox & Co. be remanded to the proper forum where the questions involved could be adjusted and the stockholders of the company be heard.

Allen and McCagg and Lincoln (the latter being the assignee of Forsythe) answer the petition jointly and severally, McCagg and Lincoln for themselves, and as to the railroad on

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their land. The other respondents answered as to the Allen land. No replication was filed to the answers, and no testimony taken or heard; and on October 19, 1878, the court ordered that said cause of Edmund Allen against said company, and Buchanan as receiver, be consolidated with said original cause of Bacon Wheeler against said company, and a final decree was entered that the injunction on Allen's bill be made perpetual, and the said cross-bill be dismissed for want of equity, and that the said company pay the costs of the proceedings. And Buchanan, the receiver, moving upon his petition for an order upon Allen and Baird, Hickox & Co., and upon McCagg and Lincoln, that they surrender to him the Allen leased land, and also the McCagg and Forsythe land and its railroad, it was ordered that the prayer of the petition be denied, and further, that "inasmuch as the merits of the several matters of controversy involved in said bill, cross-bill and petition, have been fully adjudicated and determined, that said receiver take no proceedings whatever to disturb the said Allen, or his lessees or assigns, in the possession of said premises described in said petition, without the further order and sanction of this court."

The company took the case on error to the Appellate Court for the Second District, where the decree was affirmed, and the case now comes to this court.

It will be perceived from the statement made that the case is not presented in the same aspect with regard to both the mining leases here involved, hence requiring a separate consideration respecting them.

As respects the McCagg and Forsythe lease, Buchanan, the receiver of the Wilmington Star Mining Company, appointed such in a suit in chancery, of Bacon Wheeler against said company, files a petition in said suit, alleging that his company, prior to its insolvency, was lessee by assignment of this McCagg and Forsythe land, by assignment of lease thereof from McCagg and Forsythe to Alexander Crombie, but had suspended operations on the land, and only used the railroad track erected thereon. He attaches, as an exhibit, the lease, which shows that McCagg and Forsythe leased to Crombie, by a written lease requiring him to prosecute mining for coal without interruption, and forbidding him to

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assign the lease without their consent in writing, and providing for a forfeiture and determination of the lease in case of breach of any of its provisions, and that, in case of the determination of the lease, the lessee was to surrender up the premises and property.

McCagg and Lincoln (the latter being the assignee of Forsythe), on October 7, 1878, answer the petition (the answer being verified by affidavit) and deny that either the company or the receiver had any rights under the Crombie lease, alleging that they never assented to or recognized the alleged assignment by Crombie; that for more than a year then past all mining operations at the mine had been discontinued by Crombie; that the mine had been dismantled and the machinery, etc., taken away long before the appointment of the receiver; that Crombie and the company avowed their purpose to abandon the mine and not resume operations there at any future time; that to formally determine the lease, respondents, on the 8th of May, 1878, served notice on Buchanan, the receiver, and Crombie, of their election to forfeit the lease, and that after the service of the notice no resistance was offered to the re-entry of the respondents; that by the terms of the lease, in event of determination by forfeiture, the lessors were authorized to re-enter and take possession of the premises and the property placed thereon for mining purposes.

The statements of the answer were not in any manner controverted, either by replication or by proof.

We do not see what other order a court could properly make in such a case as to McCagg and Lincoln, and Allen holding under them, than to deny the prayer of the petition.

But plaintiffs in error object to the further order made by the court, after denying the prayer of the petition, that the receiver should not disturb Allen or his lessees in possession of the premises, without the further order or sanction of the court, and say: "As to the defendants in error, McCagg and Lincoln, they were made parties defendant to the receiver's petition, and answered accordingly. As the petition was dismissed on the final hearing, the defendants were out of court, and any order or decree entered as to them on the prayer of the Allen bill, was absolutely void, for the reason they were not parties to the bill."

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But as to McCagg and Lincoln, and Allen claiming under them, the order was not entered on the prayer of the Allen bill.

The receiver's petition, and McCagg and Lincoln and Allen's answer thereto, as to the McCagg and Forsythe land, were in the suit in which Buchanan was appointed receiver, and the order was entered in that cause, denying the prayer of the petition; and what is complained of further, was but giving the receiver instructions as to his management of the business in his charge. We think this might properly be done.

With respect to the other lease, that of Allen, various objections are made to the proceedings in regard thereto, as the not dismissing the Allen bill, the dismissing the cross-bill, denying the prayer of the petition, granting the injunction on the Allen bill, and making it perpetual.

The Allen lease provided for the payment of a rent of fifteen cents per ton for each ton of coal mined, and after the expiration of eight months, a royalty of one ton per day as additional rent, the rent to be paid on the 15th day of each month, and that the mining operations should be prosecuted with reasonable diligence, and that in case of failure to perform the covenants of the lease, the lessor could declare the lease ended and re-enter, and that after default the lessee was to surrender up possession of the premises and the improvements, etc., which the lessor was to receive in lieu of damages, etc. After appointment had been made of a receiver of the company, and on April 20, 1878, Allen filed his bill against the company and the receiver (making the lease an exhibit), alleging default in the covenants of the lease in two particulars—in the non-payment of the rent due on the 15th day of March, 1878, and in the failure to prosecute mining operations with reasonable diligence, whereby the lease had become forfeited; and that in exercise of his right to determine the lease, he had given notice thereof to the company, and would proceed to re-possess himself of the premises within twenty days from the service of the notice, praying for an injunction to restrain the company and its receiver from removing from the premises any machinery, etc., pending the proceedings instituted by complainant to recover possession thereof, and until further order of the court.

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The answer of the company and the receiver denied there was any rent due, admitted a suspension of mining operations, but that it was only temporary and not with the intention of abandonment, and assigning reasons for the want of diligence in prosecuting the work of mining. No replication appears to have been filed to this answer. At the same time of filing their answer, May 14, 1878, the company and the receiver filed their cross-bill praying for a counter injunction against Allen to restrain him from further prosecuting his proceedings to obtain possession of the demised premises. No answer was filed to this cross-bill.

Subsequently on their motion, leave was granted the company and receiver to withdraw their cross-bill, and to file the same as an original bill. On the 15th day of June following, the temporary injunction which had been granted on the cross-bill was dissolved.

On the 23d day of September, 1878, as before stated, the receiver filed his petition in the case of Bacon against this company, wherein he had been appointed receiver, and in this petition set up the whole subject-matter of the controversy involved in the aforesaid bill of Allen and the said cross-bill thereto, and also the additional matter of the McCagg and Forsythe lease.

In the answer, verified by affidavit of Allen, to this petition, he sets forth the previous filing of the bill of Allen against the company and the receiver, and of the cross-bill of the company and receiver; that upon full hearing of said cause upon original bill, answer and cross-bill, an order was made dissolving the injunction on said cross-bill, and continuing the injunction on the original bill; and then avers that after such determination, the solicitor for the receiver distinctly announced to the solicitor for Allen that, having taken counsel in Chicago on that subject, he should not prosecute any appeal, as at first proposed, and told him to inform respondent of such determination, and that he might proceed on the following Monday to take possession of the premises according to the demand in writing previously made upon the receiver. That accordingly respondent did take possession of the premises, and leased the same to Baird, Hickox & Co., for a term of ten years; that said lessees, at an expense of not less than $4,000,

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had refitted the mine and resumed operations, and were raising at an average of two hundred tons of coal a day therefrom.

As before said, this answer was not questioned by exceptions nor contradicted by either pleading or proof. And on the 19th day of October following, the final decree was entered, no proofs whatever having been taken.

The essential matter involved here was the right of forfeiture of Allen's lease. Upon the allegations of the parties, there being nothing more, we should say it does not appear that there was a right to forfeit the lease for non-payment of rent.

Whether there was for not prosecuting the mining operations with due diligence, admits of question. But we do not feel called upon to go into the inquiry and determine what was the strict right in this respect, in view of the nature of the proceedings here.

The court here had in its custody, and was in the administration of the estate of an insolvent corporation over which it had appointed its receiver. We view the bill, cross-bill and petition, as of the same essential character, as being all in the nature of applications to the circuit court, having jurisdiction over the receiver, the estate and the business, respecting the administration and management of the property. And the applications were all finally, by a formal order, consolidated with the principal case in which the receiver had been appointed, and were all heard together.

The leasehold interests involved here depended for their preservation upon the special condition of continued active operations. Whether they should be kept on foot was a problem of business economy as well as law. The jurisdiction of the court in such case must be largely discretionary, and we think should not be interfered with by an appellate tribunal save in instances of flagrant error and injustice. And we find none such here.

Allen, in his bill, had proposed, under the sanction of the court, to prosecute proceedings to test his right of forfeiture under his lease. For this purpose due notice had been served. But his proceeding was stayed by injunction granted upon the cross-bill of the company and the receiver. Upon the dis-

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solution of this injunction, as appears by sworn answer uncontradicted, Allen was soon after expressly informed, by a message from the attorney for the company, as well as the receiver, that no appeal would be prosecuted, and that on the following Monday he, Allen, might proceed to take possession of the premises. He accordingly did so, and made a new lease of the premises to lessees, who proceeded thereunder and refitted the mine and resumed operations, making a large expenditure of money in so doing.

After this abandonment of the lease and surrender of possession, and such action had upon the faith thereof, it would be highly inequitable to retract what was a virtual surrender of the lease, and there should be an estoppel to do so.

We do not agree with the view urged, that as on final hearing the prayer of the petition was denied, the petition and answer thereto were dismissed out of court, and, therefore, that the decree was entered, not on the allegations of the petition and answer thereto, but on the original bill and answer. We do not think that the petition is to be disconnected from the bill and cross-bill, and they be treated as if they were separate proceedings, but that the whole record is to be taken together, and the decree of the court be considered as made in view of all the allegations of the parties as contained in all the pleadings in the case.

Criticism is made upon the language of the bill, as not being sufficient to found an injunction upon.

We think the allegations in this respect have been considered with too much strictness, and, further, that the peculiar *status* of the estate here, and relation of the parties, do not require the application of all the strict rules of pleading which obtain between ordinary litigants.

It is objected that the bill was for a temporary injunction only, to restrain the removal of property, pending proceedings at law for the possession of the demised premises after the default, etc., and that it was error to make the injunction perpetual, there being no such relief prayed.

The prayer was for an injunction pending such proceedings, and until the further order of the court. If the court, in decreeing the injunction, was satisfied there never should be any further order of the court to the contrary of the injunction,

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the court, we think, might, not improperly, under the prayer of the bill, make the injunction perpetual. If there was reason for an injunction in the case, there was the same reason for its being perpetual. We regard this objection as one relating to no more than a matter of form.

The orders and decree being with reference to the administration of an estate, which was in the custody of the court, and under its superintendence, we find no sufficient reason for interference therewith, and the decree will be affirmed.

Decree affirmed.

AUSTIN v. THE HUNTSVILLE COAL AND MINING CO.

(72 Missouri, 535. Supreme Court, 1880.)

[1] **Instrument construed as a coal lease.** An instrument which purports to lease and convey all the coal in certain land for the term of twenty years, in consideration of $400 per annum, to be paid in monthly payments of $33.33, is not an absolute grant of all the coal under the land, but is a lease of all the coal which the second party can mine during the term limited.

The bare execution and delivery of a coal lease without entry or taking possession of the land or coal, does not vest any property in the coal in the lessee.

Trespasser settling with pretended lessee. The defendant, in an action for trespass, in taking coal from plaintiff's land, can not take shelter under an alleged settlement and accounting with a party who has accepted a lease of the coal land from the plaintiff, but who has never made an entry thereunder.

Trespass by lessor—Outstanding lease. The owner of coal lands may maintain trespass for the invasion and injury of his possession by mining coal, and for the permanent injury to the freehold caused thereby, although there is an outstanding lease for the same premises, provided possession has not been taken under the lease.

Judgment for rent of coal lands—Title to coal. The recovery of a judgment for rent under a coal lease does not vest the title to the coal not mined, in the lessee, no matter whether the judgment is collected or not.

[2] **Measure of damages for trespass in mining coal.** In an action for trespass in mining and carrying away coal, if it appears that the act of the defendant was not willful or grossly negligent, the measure of damages is the value of the coal at the mouth of the pit, less the cost of severing it and raising it.

[1] *Watson* v. *O'Hern*, 8 M. R. 333.

[2] *Freck* v. *Locust Mountain Co.*, 9 M. R. 57.

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Appeal from Chariton Circuit Court, Hon. G. D. BURGESS, Judge.

This was an action of trespass, to recover treble damages for mining and taking coal from under plaintiff's land. The facts were as follows: On the 27th day of February, 1871, the plaintiff executed an instrument leasing and conveying all the coal under his land to the North Missouri Coal and Mining Company, for a period of twenty years. This instrument is set out in full in the opinion. This company never entered upon the land or did any work under the contract, and, failing to pay the stipulated rent, plaintiff sued and obtained judgment for the full amount to become due for the whole term as specified in the contract, but the company proving to be insolvent, the judgment was never satisfied. In the year 1875, the defendant, The Huntsville Coal and Mining Company, sunk a shaft upon land adjoining plaintiff's, and in the course of its operations took out large quantities of coal from under plaintiff's land. This suit being brought for the trespass, the defendant, claiming that the North Missouri Coal and Mining Company was, by virtue of the foregoing contract, owner of the coal, settled with that company by paying $50 and taking a receipt in full, and then pleaded this settlement in bar of plaintiff's claim. There was a trial, resulting in a judgment for defendant, from which plaintiff appealed.

CHAS. A. WINSLOW, for appellant.

1. The instrument executed by Austin and wife to the North Missouri Coal and Mining Company was a lease. The limitation to twenty years unalterably stamps the estate conveyed as one for years, with all its legal incidents, irrespective of the granting or descriptive clauses. It does not pass the title to the entire mineral in the ground: *Bradley* v. *Phosphate Co.*, 1 Hughes, C. C. 72; *Johnstown I. Co.* v. *Cambria Co.*, 32 Pa. St. 241; *Funk* v. *Haldeman*, 53 Pa. St. 229; *Grubb* v. *Bayard*, 2 Wall., Jr., 81; *Knight* v. *Coal and I. Co.*, 47 Ind. 105. It passes only the right to the possession and use of the land for mining purposes during the continuance of the term: 1 Washburn, Real Prop. (4 Ed.), 436; 4 Kent Com. (11 Ed.), 92; Chase's Blackstone, 322, 325; 1 Greenl. Cruise, 432.

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2. The North Missouri Coal and Mining Company, by the execution of the lease, acquired merely what is known in the law as the *interesse termini:* 1 Wash., Real Prop. (4 Ed.), 442; 4 Kent Com. (11 Ed.), 106; Taylor, Land. and Ten. (6 Ed.), 11; 1 Platt, Leases, 22; 1 Cooley's Blackstone, 425; Chase's Blackstone, 326; 5 Bac. Abridg., Bouvier, 631; 1 Greenl. Cruise, 243; Smith, Land. and Ten. 45, and never having gone into possession had no such interest in the coal as would authorize it to settle with defendant for the trespass committed thereon: *Lutwich* v. *Mitton*, Cro. Jac. 604.

3. The damage shown by the record was a permanent injury to the freehold, and thus a damage to plaintiff's reversion, for which he may recover, even though a right of action might exist in the lessee for the injury to the possession. There was no entry by the lessee, the term has long since been adandoned, and Austin's damages go to the entire extent of the coal taken: *George* v. *Fisk*, 32 N. H. 32; *Wood* v. *Griffin*, 46 N. H. 230; *Parker* v. *Shakelford*, 61 Mo. 68; *Lewis* v. *Branthwaite*, 2 Barn. & Adolph. 437.

4. The recovery of judgment by plaintiff against the North Missouri company for rents is no bar to this action. It did not convert the rents into purchase money. The lease itself declares these rents to be a personal debt, and provides that after forfeiture they "may be collected as any other debt." These provisions are in fact liquidated damages for a forfeiture or abandonment of the lease.

5. As to the measure of damages, see *Martin* v. *Porter*, 5 M. & W. 351; *Morgan* v. *Powell*, 3 Q. B. 278; *Maye* v. *Yappen*, 23 Cal. 306; *Barton Coal Co.* v. *Cox*, 39 Md. 1; *Robertson* v. *Jones*, 71 Ill. 405; *McLean Coal Co.* v. *Long*, 81 Ill. 359; 2 Waterman on Tresp., p. 540, § 1096.

MARTIN & PRIEST, also for appellant.

1. Plaintiff, being in possession, was the only person entitled to sue for the trespass: *Fitch* v. *Gosser*, 54 Mo. 267; *Cochran* v. *Whitesides*, 34 Mo. 417; *Reed* v. *Price*, 30 Mo. 442; *Pope* v. *Cordell*, 47 Mo. 251; *Fuhr* v. *Dean*, 26 Mo. 116; Blanchard & Weeks on Mines, 189; *Rogers* v. *Cooney*, 7 Nev. 213.

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2. Plaintiff was in possession and the rent unpaid; hence, under the statute of landlord and tenant the lease was forfeited: Wag. Stat., p. 882, § 33. As to what is a lease, see *Boone* v. *Stover*, 66 Mo. 434; *Hamilton* v. *Wright*, 28 Mo. 199; *Dark* v. *Johnston*, 55 Pa. St. 164; S. C., 6 Am. L. Reg. (N. S.) 543; Washburn's Real Prop. (4 Ed.), 292 to 397; *Sennett* v. *Bucher*, 3 Pa. 392. Then if it be a lease and the rents unpaid and plaintiff in possession, it was forfeited, and the North Missouri Coal and Mining Company had no rights in the coal by which it could settle the damages. But if the instrument be a license, which plaintiff claims it is (Bainbridge on Mines, p. 261 to 275, inclusive), then the North Missouri Coal and Mining Company never had any right or title to any of the coal, nor could have none until the coal was severed from the freehold.

JOHN F. WILLIAMS and THOMAS B. REED, for respondent.

1. The grant of Austin to the North Missouri company was a sale of the coal, whereby he divested himself of all interest in it. It was no lease. There is no provision for forfeiture. The monthly payments are absolute—not depending on the value of the mining operations. The coal is conveyed absolutely, without qualification or condition; and the time given to take it away is twenty years: *Gowan* v. *Christie*, L. R. 2 Scotch App. 284; S. C. 5 Eng. (Moak), 123; *Massot* v. *Moses*, 3 So. Car. 168; S. C. 16 Am. 697; *Caldwell* v. *Fulton*, 31 Pa. St. 475; *Funk* v. *Haldeman*, 53 Pa. St. 229. The full power to take, without liability to account, was conferred upon the grantee, and that is equivalent to ownership itself, it being the highest attribute of ownership, and a gift of the one necessarily carries with it the other: *Morris* v. *Phaler*, 1 Watts, 389.

It was not a grant of a privilege or mere license to dig, hunt and search for coal, and dispose of what might be found in twenty years, but a grant of all the coal on and under said lands—a grant of the entire subject, without any restrictions or limitations; and the law is, that where the intent is to give the entire usufruct and power of disposal, as in this case, the legal title must be held to pass: Blanchard & Weeks

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on Mines, 31. Livery of seizin is no longer indispensable to the grant of a corporeal hereditament. Unopened mines may be conveyed, and the grantee takes more than a right issuing out of land or exercisable therein. He takes the mines themselves: *Caldwell* v. *Fulton*, 31 Pa. St. 475. Where there is a grant of all the coal, as in this case, it effects a severance of the right to the surface from the underlying coal. It makes them distinct corporeal hereditaments: *Caldwell* v. *Copeland*, 37 Pa. St. 427; *Seaman* v. *Vawdrey*, 16 Ves. 390.

2. The grantee alone can maintain trespass, because he is entitled to the full damage: *Attersoll* v. *Stevens*, 1 Taunt. 183; Blanchard & Weeks on Mines, 437; 37 Pa. St. 427; 5 Eng. (Moak), 123.

3. As to the measure of damages, see *Forsyth* v. *Wells*, 41 Pa. St. 291; *Mueller* v. *St. L. & I. M. R. R. Co.*, 31 Mo. 262; Blanchard & Weeks on Mines, 633 to 636; Bainbridge on Mines, 570; *Waters* v. *Stevenson*, 13 Nev. 157; *Kier* v. *Peterson*, 41 Pa. St. 357.

SHERWOOD, C. J.

This action for damages for coal taken by defendant from under plaintiff's land, requires an examination into the nature and effect of an instrument in this form:

This agreement, made and entered into this 27th day of February, 1871, by and between Jno. H. Austin and Mary J. Austin, his wife, parties of the first part, and the North Missouri Coal and Mining Company, parties of the second part, witnesseth: That for and in consideration of one dollar in hand paid, and the further consideration of $400 per annum, to be paid in monthly payments of $33.33 on the 20th day of each and every month, the said parties of the first part do hereby lease and convey, for themselves, their heirs and assigns, for the term of twenty years from the date hereof, to the party of the second part, their heirs and assigns, all the coal on or under the following land, to wit: (describing the same.) Also 100 feet of the surface from the center of the North Missouri Railroad, extending the whole length of the twenty acres touching the road, for the erection of such buildings as may be necessary for the safe and economical working

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of said coal, and such right of way as may be necessary for the successful mining and removing of said coal.

And said parties of the first part hereby bind themselves not to grant a right of way for the purpose of hauling coal from any other mines than those established by said company. And the parties of the first part hereby agree for themselves, their heirs and assigns, that the said party of the second part shall have the right to take down and remove all improvements, buildings and machinery put upon said land by them, as they may see fit. And the said party of the second part, for themselves, their heirs and assigns, are hereby bound that the said rent shall be paid punctually, on the 20th day of each month hereafter, at Huntsville. And if, after due notice has been given at the office of said company, in Randolph county, said monthly rent shall remain unpaid, without special agreement, for the space of two months, then said party of the second part shall forfeit and pay to the said party of the first part one year's rent. And if said rent shall remain unpaid for another term of two months, then, after written notice of thirty days, the rent for the full term of this lease shall become due and payable, and the same may be collected as any other debt; but if, during the term of this lease, said coal company should close their office in Randolph county, then said notice of failure to pay the rent shall be given at the general office of said company to the president or treasurer of said company.

This instrument was duly signed and sealed by the parties, and was acknowledged by the grantors, in due form, under the statute, and was recorded March 18, 1871.

I.

We are well satisfied from a consideration of the language of this instrument, that no reasonable construction could accord to it any other character than that of a lease. The salient features of such an instrument are certainly present here. We have the apt term "lease" employed. We have the monthly "recompense of rent," and the "determinate period" at the expiration whereof the contract ceases by its own express limitation. If the parties had intended an absolute grant of "all the coal" under the land described, the time

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during which the coal should be dug would not have been limited, for, by thus limiting the time during which mining operations were to be carried on, it is equivalent to saying that the party of the second part is to have all the coal it can mine on the premises before the lapse of twenty years.

And we are not of opinion that the word "convey" should be allowed to overthrow the operation of the word "lease," which precedes it. We think the instrument itself, taken as a whole, and the authorities cited by plaintiff, fully support the views above announced.

II.

If those views are correct, the next point for determination is, what interest did the North Missouri Coal and Mining Company acquire by reason of the execution of the lease by Austin, and the reception thereof by such company. It stands admitted that no entry was made under this lease, nor possession of either land or coal, nor anything done in that direction by the lessee. What passed then to the lessee in consequence of the delivery of the lease? It is said that "a tenant for years is not said to be seized of the lands, the possession not being given him by the ceremony of livery of seizin. Nor does the mere delivery of a lease for years vest any estate in the lessee, but only gives him a right of entry on the land; when he has actually entered, the estate becomes vested in him, and he is then possessed, not properly of the land, but of the term for years, the seizin of the freehold still remaining in the lessor" (1 Greenleaf's Cruise, 243), and that "until the lessee shall have entered upon the leased premises he acquires no estate in the same. The interest which he acquires by the delivery of the lease, and before entry made, is an *interesse termini*." 1 Wash., Real Prop. (4th Ed.), 442. "Before entry under the lease, as a demise at common law, the lessee had only an executory interest, or *interesse termini*, and no possession; and *interesse termini* is the right to the possession of a term at a future time, and, upon an ordinary lease to commence *instanter*, the lessee, at common law, has an *interesse termini* only until entry." 4 Kent, Com. (11th Ed.), 106. "The estate of a lessee for years is called a term, *terminus*, because its duration is limited and determined; for every such estate

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must have a certain beginning and a certain end. It is perfected only by the entry of the lessee, for before the time fixed for entry, the whole estate remains in the lessor, and the lessee has no estate in the land, but merely a right thereto which is called an *interesse termini*. * * * * * * After the period fixed for the commencement of the term, the lessee's interest is still called an *interesse termini*." Taylor Land. and Ten. (6th Ed.) 11. "A lease for years must be perfected by the entry of the lessee. * * * Before entry the whole estate remains in the lessor, the lessee for years having in strictness no estate, but merely a right, denominated an *interesse termini*." 1 Platt, Leas., 22. "Nor indeed does the bare lease vest any estate in the lessee, but only gives him a right of entry on the tenement, which right is called his interest in the term, or *interesse termini*." 1 Cooley, Black. Com. 425; Chase's Black. 326.

Since no entry was made by the North Missouri Coal and Mining Company, we must conclude, if we follow the authorities quoted above and others cited for plaintiff, that as the lease was not perfected in the manner we have pointed out, such company acquired neither possession of the land nor property in the coal by reason of the bare execution and delivery of the lease.

III.

This being the case, the defendant can not take shelter under an alleged settlement and accounting with the North Missouri Coal and Mining Company for the coal unwarrantably taken from the land of the plaintiff.

IV.

There is another reason flowing from the non-entry of the North Missouri Coal and Mining Company, Ex. Gr.: The lease never having become operative, in consequence of no possession having been taken thereunder, the plaintiff remained possessed as he was originally, and so could maintain trespass for the invasion of and injury to his possession: *Cochran* v. *Whitesides*, 34 Mo. 417; *Moore* v. *Perry*, 61 Mo. 174.

V.

There is another ground, aside from the injury to the possession, whereof plaintiff may bottom his action, and that is

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for the permanent injury to the freehold, consequent upon taking large quantities of coal from the premises: *George* v. *Fisk*, 32 N. H. 32; *Parker* v. *Shakelford*, 61 Mo. 68. And no distinction is to be taken in this regard between trespass in cutting and removing trees, and the removal of ores from beneath the surface: *Lewis* v. *Branthwaite*, 2 B. & A. 437.

VI.

We are unable to see the relevancy of the evidence offered by defendant, of the recovery of judgment by plaintiff against the North Missouri Coal and Mining Company. It was proved that the plaintiff gave the notices provided for under the lease, and then sued that company and recovered judgment, as above stated. But it was shown also that that company, when this cause was tried, was both defunct and insolvent, so that such recovery of judgment was of no avail. Besides the lease declared the rents to be a debt, and, after default in payment, to be "collected as any other debt." It seems settled by the authorities that though the lessee fails, through lack of entry, to convert his *interesse termini* into an actual estate, this does not affect the lessor's right to recover; entry of the lessee not being essential to such recovery; since the rent becomes due upon the lease, not upon the entry, and the action is upon the covenant as for a breach of an executory covenant: 1 Platt, Leas., 23; Taylor, Land. and Ten. (6th Ed.), 11; 1 Wash., Real Prop., 445. Even if the judgment recovered by plaintiff against the North Missouri Coal and Mining Company had been satisfied, this could not have converted what was merely rent money into purchase money, and so have vested the title to the coal in such company; and this must *a fortiori* be the case where no such satisfaction has occurred. Even in actions of trespass or trover, according to the more modern authorities, the title to the specific chattel does not pass—the principle of *transit in rem judicatam* does not apply—until the judgment be made productive in satisfaction to the party: *Drake* v. *Mitchell*, 3 East, 251; 2 Kent, 488; Cooley on Torts, 451.

VII.

As this cause was not tried in accordance with the foregoing views, a reversal must occur; and we are asked in that

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event to declare the true measure of damages in cases of this sort. The court below, at plaintiff's instance, gave this declaration of law on that point: "The measure of damages for the coal taken is the value thereof at the mouth of the shaft, less the cost of raising it, and without any deduction for the expense of getting or severing it from the freehold." The report of the referee discloses that the coal was worth one half a cent in the mine, and seven cents a bushel at the mouth of the shaft, or in the proportion of one to fourteen. There is, doubtless, abundant authority which supports the above declaration of law: *Martin* v. *Porter*, 5 M. & W. 351; *Morgan* v. *Powell*, 43 Eng. Com. Law, 734; *Barton Coal Co.* v. *Cox*, 39 Md. 1; *Robertson* v. *Jones*, 71 Ill. 405; *McLean Coal Co.* v. *Long*, 81 Ill. 359; Waterman on Tres., § 1096; *Moody* v. *Whitney*, 38 Me. 174; *Llynvi Co.* v. *Brogden*, L. R., 11 Eq. Cas. 188; *Wild* v. *Holt*, 9 M. & W. 672.

But there is no lack of authority sustaining a different view of the matter: *Stockbridge Iron Co.* v. *Cone Iron Works*, 102 Mass. 80; *Forsyth* v. *Wells*, 41 Pa. St. 291; *Chamberlain* v. *Collinson*, 45 Iowa, 429; *Waters* v. *Stevenson*, 13 Nev. 157; *Foote* v. *Merrill*, 54 N. H. 490; *Maye* v. *Yappen*, 23 Cal. 306; *Goller* v. *Fett*, 30 Cal. 481; *Ham* v. *Sawyer*, 38 Mo. 37; *Hilton* v. *Woods*, L. R., 4 Eq. Cas. 432; *Baldwin* v. *Porter*, 12 Conn. 473; *Curtis* v. *Ward*, 20 Conn. 204; 2 Greenleaf Ev., §§ 253, 254; *Pierce* v. *Benjamin*, 14 Pick. 356; *Wood* v. *Morewood*, 3 Q. B. 440; *In re United Merthyr Coal Co.*, L. R., 15 Eq. Cas. 46. Thus in the case cited from Pennsylvania, it is remarked: "Where there is no wrongful purpose or wrongful negligence in the defendant, compensation for the real injury is the purpose of all remedies; and so long as we bear this in mind we shall have but little difficulty in managing the forms of actions so as to secure a fair result. If the defendant was guilty of no intentional wrong he ought not to have been charged with the value of the coal after he had been at the expense of mining it; but only with its value in place, and with such other damages to the land as his mining may have caused." So in the Massachusetts case it was said: "The value of the ore is to be estimated as it lay in the bed, and not as it was after defendant had increased its value by removing it. To this is to be added the damage

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done to the real estate." And in the Nevada case it was ruled that in the deductions made for the defendant's expenses, the necessary cost of mining the ores was to be added, and the sum total subtracted from the gross yield of the ore, the court saying: "We are of opinion that in all actions sounding in tort, no fraud or culpable negligence appearing, the aim of the law is to award to the injured party full compensation for his actual losses, as the law defines those words, and nothing beyond that amount."

Similar enunciations as to the measure of damages occur in the cases instanced from Iowa, California and New Hampshire; and in the somewhat recent case of *In re United Merthyr Co.*, *supra*, decided in 1872, the vice-chancellor, Sir James Bacon, said: "The principle of the decision is, that the plaintiff, although he has suffered a wrong, shall not have any more than he would have had if that wrong had not been committed. That I take to be a clear and plain principle. If he had himself severed the coal, he could only have done so by means of disbursements; if he had brought it to the pit's mouth when severed, he could only have done so by means of disbursements. If he had himself severed and brought the coal to the pit's mouth, whatever the value of it might then be would have to be deducted, because he would have borne the expense on both these heads, which would have been actual disbursements, not profit. * * * The plaintiff is to be put in the same situation as he would have been in, neither better nor worse, if he himself had severed the coal and brought it to the pit's mouth." And in the absence of any suggestion of fraud, it was ordered that the expense of severing the coal and bringing it to the pit's mouth should be deducted from the value of the coal thereat, and the defendant made answerable to the plaintiff for the residue.

Mr. Greenleaf holds similar views respecting the point of damages in general, saying: "Damages are given as a compensation, recompense or satisfaction to the plaintiff, for an injury actually received by him from the defendant. They should be precisely commensurate with the injury; and this whether it be to his person or estate." *Ubi supra.* The same view is taken in Connecticut: "No good reason, consistently with moral principle, can be suggested, why greater

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damages should ever be recovered than have in truth been sustained, except in those cases where the law permits, by way of punitive justice, the recovery of vindictive damages." 12 Conn., *supra*. The authorities from which we have quoted seem to us to announce the true measure of damages, where there is no element of willfulness or wrong, or such gross negligence or disregard of others' rights as leads necessarily to the inference of willfulness or wrong; because a party engaged in mining may readily ascertain, by proper dealing, that he is trespassing on his neighbor's property: 9 M. & W. and 39 Md., *supra*.

In England, and in some of our sister States, the result reached in cases of the character under discussion, and which gave origin to the rule which plaintiff invokes, is no doubt owing to technicalities from which we are happily freed, since we have but one form of action in this State, and consequently are not hampered by mere matters of form in seeking redress for injury done. This being the case, there would seem to be neither reason, justice, nor consistency in paying the party for his labor in raising the coal to the mouth of the shaft, in paying him nothing for his labor in severing it from the freehold; *i. e.*, in getting it into such condition that it could be delivered at the mouth of the shaft. If the labor of the trespasser deserves compensation in one instance, why not in another? By the operation of what principle, based upon common sense, can you thus apportion the injury done—pay for its continuation, but deny pay for its inception? This action is brought for treble damages under the statute (1 R. S. 1879, § 3921), which evidently gives recognition to the proper distinction to be taken between acts of unintentional and acts of intentional and flagrant wrong (Id., 3924), and thus far is in accord with the views hereinbefore expressed. We reverse the judgment and remand the cause with directions to proceed conformably hereto.

All concur.

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KRABER'S APPEAL.

(12 Reporter, 476. Supreme Court of Pennsylvania, 1881.)

[1] **Royalty upon ore which mine will produce.** A mining lease was made whereby the lessees undertook to mine two thousand tons per annum, and pay a royalty of one dollar per ton, and to pay $2,000 per annum, whether they took two thousand tons or not, "provided that quantity can be got upon the said demised premises," and a sufficient quantity of water could be there had to wash that amount; and if two thousand tons could not be "mined with advantage," to pay for the amount actually mined; after the lessees entered, the ore was found to be poor in quality, and not profitable to be mined in seasons of low prices, but yet not so unmerchantable as to be of a different quality from the article contracted for. *Held*, 1. That the amount which could be mined in any one year must be paid for; 2. That equity would not enjoin the lessors from bringing an action for royalty or a portion thereof.

Appeal from and writ of error to, the Common Pleas of York County.

The facts appearing were as follows: In 1868 L. J. and I. C. Dellone leased to Kraber and Nes a piece of land for mining purposes. By the articles of agreement, the lessees were to erect the necessary machinery and mine two thousand tons of ore per annum, and pay a royalty of one dollar per ton for the amount mined; and to pay $2,000 per year whether two thousand tons were taken or not, "provided that quantity is to be had and can be got on the said demised premises in each year, and provided, also, that a sufficient quantity of water can be had on said field to wash such ore as shall be necessary with the lump ore to make up the two thousand tons per annum;" and in case of deficiency of ore or water, to pay for the ore actually mined at the rate of one dollar per ton. The lessees entered and mined. On May 10, 1869, they transferred their lease to the Thomas Iron Company, which company entered and worked the mine until August 18, 1869, when it quit work, alleging that the ore had so deteriorated that working the mine was unprofitable, and offered to surrender the lease and possession of the premises. The lessors brought an action at law against the original lessees, and obtained judgment

[1] *Watson Co.* v. *Casteel*, 9 M. R. 130; *Phillips* v. *Jones*, 8 M. R. 344.

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for the royalty for one quarter of a year. The lessees and the Thomas Iron Company filed a bill setting out *inter alia*, the above facts, and averred that owing to the unmerchantable character of the ore they had sustained great loss in working the same, and prayed for a decree ordering cancellation of the lease and restraining the lessors from proceeding in their action at law. After an answer the case was referred to a master, who found that there was plenty of ore to answer the contract, although it was of a poor quality and not to be profitably worked in seasons of low prices, but that it was not so unmerchantable as to be a substance different from that contracted for. He accordingly reported a decree dismissing the bill. Exceptions being filed after argument, the Common Pleas, FISHER, P. J., delivering the opinion, affirmed the report for the following reasons: "First, because the party plaintiff can make every defense that could be made were suit brought on each payment when it becomes due, as stipulated in the lease, and because the defendants in this bill would be deprived of the privilege of showing that at certain times the ore could be mined and disposed of to advantage, although it might not be marketable at other times, depending upon the demand or want of demand for iron, should they be enjoined from proceeding at common law to enforce their claim. Our opinion is that in any one year or years in which the ore was marketable, and could be used to advantage, the plaintiffs in the bill would be obliged to pay the defendants the amount stipulated in the lease. Second, because the evidence is too vague, uncertain and contradictory to enable us to make a decree in favor of the bill, and because, also, there is not that preponderance of evidence on the part of the complainants in this bill as required to enable the court to grant the relief asked for."

The plaintiffs appealed.

H. L. FISHER and W. C. CHAPMAN, for appellants and plaintiffs in error.

JOHN GIBSON, H. M. NORTH and J. W. SIMONTON, *contra*.

PER CURIAM.

We think the interpretation of the agreement, given to it by the court below, was substantially correct. The concluding

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part of the agreement properly interpreted would read as if written thus: "And if the parties of the second part can not get out two thousand tons gross per year, because of a deficiency of ore or of water, so that two thousand tons can not be mined with advantage, then the parties of the second part shall pay for the ore mined by them at one dollar per ton, as aforesaid." The clause evidently goes in relief of the lessees, if, by the scarcity of ore or of water, two thousand tons can not be advantageously mined, but what can be advantageously must be paid for. The verdict of the jury in the case at law establishes the plaintiffs' right to recover, and the judgment must be affirmed. In the equity case there is more difficulty owing to the closeness of the facts, and the difficulty the master had in reaching and stating an entirely clear conclusion. Yet we think his conclusion did not reach the point of finding that the ore had deteriorated so far as to become entirely or substantially unfit for furnace use. Indeed he does not positively find that there was such deterioration, while it is conceded that the top ore was good when the contract was executed. His finding went so far as the evidence would seem to justify him; and the result is this, that there is plenty of ore to answer the contract, and that though poor in quality, and not profitable to be worked in the seasons of low prices, yet it is not wholly unfit to be worked, and can not be pronounced to be so unmerchantable as to be a substance different from that contracted for. What future experiments may prove to be its real character we can not say, but must decide on the present state of the case.

Decree affirmed at cost of appellant.

On motion a re-argument was granted, after hearing which the following opinion was filed.

PER CURIAM.—After having heard the very full and able re-argument of this appeal our opinion remains unchanged.

Decree as originally entered to stand.

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THE WATSON COAL AND MINING CO. v. CASTEEL.

(73 Indiana, 296. Supreme Court, 1881.)

Variance between statement and copy. Where there is a material variance between the contents of an instrument, as stated in the complaint, and as shown by copy filed, the copy will control.

[1] **Construction of lease as to minimum rent, royalties and penalties.** By the terms of a mining lease, lessees agreed to test land for coal. If they found sufficient to justify mining, they were: (1) To sink a shaft and be mining within one year, or, in default thereof, pay $100 per month until such shaft was in operation. (2) They were to pay a royalty of 25 cents per ton, and to mine enough to make the royalty at that rate amount to $1,200, or, in default thereof, pay $1,200, in monthly installments of $100 each; "all payments herein provided for of one hundred dollars per month" to apply on the rent or royalty. *Held*, that the lessees, if they found the coal, were bound (1) To sink the shaft and be mining within one year, or pay $100 per month as a penalty. 2. That the first and second covenants were independent of each other. 3. That lessees were bound to pay a minimum rent of $100 per month in any event, after they had sunk a shaft, the same to apply on the royalty of 25 cents per ton, in case the same aggregated more than $1,200.

[2] **Relation of lessor to tenant's assignee.** There is a privity of estate between the lessor and the assignee of the lessee which makes such assignee liable for rents or royalties.

[3] **Royalties, no payment on rent.** The offer to prove full payment of the royalties on all coal mined and the exhaustion of the mine: *Held*, irrelevant in a suit for minimum rent, unless such royalties *exceeded* the minimum rent.

Excluded offer. When the object of an offer of testimony is not disclosed by the record the court will presume in favor of the ruling below.

From the Clay Circuit Court.

D. E. WILLIAMSON, A. DAGGY, G. A. KNIGHT, C. H. KNIGHT, N. B. TAYLOR, F. RAND, and E. TAYLOR, for appellant.

W. W. CARTER and S. D. COFFEY, for appellee.

[1] *Bute* v. *Thompson*, 8 M. R. 371; Note 64, *post* 140.

[2] *McDowell* v. *Hendrix*, 9 M. R. 96.

[3] By this decision, as we understand it, if the lessees had mined 4,799 tons (on which, at 25 cents, the royalty would be $1,199.75) they were bound to pay the minimum rent, $1,200, *plus* the royalty, $1,199.75, total $2,299.75. But if they had mined 4,801 tons, they would have been bound to pay only $1,200.25; in other words, that the royalty did not apply on the rent, until it exceeded the same. And yet we can not see that the lease justified or even intimated such a construction.

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HOWK, C. J.

In this action the appellee, as lessor, sued the appellant, as the assignee of the lessees in a certain mining lease, to recover certain rents or royalties alleged to be due and unpaid under said lease. The appellant's demurrer to the appellee's complaint, for the alleged insufficiency of the facts therein to constitute a cause of action, was overruled by the court, and to this ruling the appellant excepted. The trial of the cause by a jury, after the same had been put at issue, resulted in a verdict for the appellee, assessing his damages in the sum of fourteen hundred dollars; and the appellant's motion for a new trial having been overruled, and its exception saved to this decision, the court rendered judgment on the verdict.

Errors have been assigned by the appellant in this court, which call in question the sufficiency of the facts stated in appellee's complaint to constitute a cause of action, and the correctness of the decision of the trial court in overruling the motion for a new trial.

The controlling question for the decision of this court, as it seems to us, is this: Does the appellee's complaint state facts sufficient to constitute a cause of action? In his complaint the appellee alleged, in substance, that on the 23d day of August, 1873, he, the appellee, executed to Benjamin F. Masten, John H. Masten and John J. Schrack, a certain mining lease upon certain real estate, particularly described, in Clay county, Indiana, with the exceptions therein mentioned, for the period of twenty-five years thence next following, for the purpose of mining coal therefrom, amongst other purposes; in which lease the said Masten, Masten and Schrack undertook, covenanted and agreed with the appellee to mine coal enough from under said land, that the rent or royalty thereon should amount to $1,200 per year, at twenty-five cents per ton, and that in the event that they should fail to mine that quantity of coal, they agreed, undertook and covenanted with the appellee to pay him said amount of money per year, in monthly installments of $100 each month—a copy of which lease was filed with and made a part of said complaint; that on the 20th day of September, 1873, the said Masten, Masten and Schrack sold and transferred said lease by assignment to the appellant, a copy of which

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assignment was filed with and made a part of the complaint; that upon said assignment the appellant agreed and undertook to perform each and every of the covenants and agreements contained in said lease, and in pursuance of said lease and assignment immediately took possession of said land and the coal strata thereunder, and commenced to dig and mine and remove the coal from under said land, and have ever since, from that date to the time of the commencement of this suit, been in possession of said land and coal strata, and in the peaceable enjoyment thereof, digging and mining said coal.

But the appellee averred that the appellant had failed, neglected and refused to keep and perform the agreements and covenants contained in said lease in this, that from the 15th day of September, 1876, the appellant had wholly failed and neglected to mine coal enough that the rent or royalty thereon would amount to $100 per month, or $1,200 per year, and had wholly failed and neglected to pay said $100 per month, or any part thereof; that the whole of said monthly payments of $100 each, from the 15th day of September, 1876, to the 15th day of November, 1877, amounting to the sum of $1,400, with the interest thereon, was due and unpaid. Wherefore, etc.

In discussing the sufficiency, or, as they claim, the insufficiency of the complaint, the appellant's learned counsel earnestly insist that the material allegations of the complaint, in regard to the rent or royalty sued for, are not authorized nor sustained by the written lease upon which the action is founded. A copy of the lease was filed with and made a part of the appellee's complaint; and if there is any material variance between the copy of the lease and the allegations of the complaint founded on any part or portion of the lease, the copy will control and will be presumed to be right until the contrary is shown. This rule is settled by the decisions of this court: *Stafford* v. *Davidson*, 47 Ind. 319; *Crandall* v. *The First National Bank of Auburn*, 61 Ind. 349; *Carper* v. *Gaar*, 70 Ind. 212.

In the proper presentation of the point made and discussed by the appellant's counsel, it is necessary that we should set out the covenants and agreements of the lessees, which constitute the basis of the action, and this we will do in the language of the lease, as follows:

"In consideration of which several grants by the party of

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the first part, the party of the second part agree to enter upon said land, and test the same for coal within ninety days from the date of this lease, and should they find coal upon said land, of sufficient quantity, quality and thickness to justify them in mining the same, then they agree to sink a shaft, slope or drift upon the same, and be mining coal within one year from this date, or, in default thereof, to pay the party of the first part the sum of one hundred dollars per month until such shaft or tunnel or drift shall be put into operation; that they will mine enough from under said land, that the royalty thereon, at twenty-five cents per ton, 2,040 pounds, shall amount to the sum of twelve hundred dollars, and, in default thereof, they shall pay to said first party the said sum of twelve hundred dollars, without having so mined, payable in monthly installments of one hundred dollars per month. And the party of the second part further agree that they will pay to the party of the first part the sum of twenty-five cents per ton of 2,040 pounds of screened coal, mined from under said land, the screen to be used in screening the same to be of no greater width between the bars than one and one-quarter of an inch. * * * All coal mined from under said land shall be paid for on the 15th day of each month thereafter, in bankable funds of the State of Indiana. * * * It is further understood and agreed that all payments herein provided for, of one hundred dollars per month, to be paid on the 15th day of each month, are to apply on the payments of rent or royalty of coal mined from the above described land: *Provided, however*, that if the 15th day comes on Sunday, payments may be made either on the day before or the day after said date; in default of payment on said date, this lease shall not be forfeited until demand shall have been made," etc.

These are all the provisions of the lease which relate to the rent or royalty reserved, and constitute the basis of the appellee's action. As we understand the final argument of the appellant's counsel, in this cause, they claim a construction of these provisions, and ask this court to approve and adopt it, which, as we think, was not intended at the time of the execution of the lease by the original parties thereto, and is not warranted by the language used therein, as above quoted. It is claimed by counsel, as we understand them, that the "one

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hundred dollars per month," and the "twelve hundred dollars" mentioned in the lease, were applicable only to the "one year" from the date of the lease, within which the lessees, if coal were found sufficient to justify them in mining, should be mining such coal, and were in the nature of a penalty for their default, if any, in this regard, within that year; and that "for all coal mined thereafter, during the existence of the lease," the lessees were to pay, as rent or royalty, "at the rate of twenty-five cents per ton of 2,040 pounds, and no more, on the 15th day of each month." This construction of the covenants and agreements of the lessees, in regard to the rent or royalty reserved in the lease, does not meet the approval of our judgment, and we can not adopt it.

We are of the opinion that the lessees' covenants and agreements, above quoted, if, upon their test of the lessor's land, they found coal therein or thereon, "of sufficient quantity, quality and thickness to justify them in mining the same," bound them, *first*, to "sink a shaft, slope or drift upon the land, and be mining coal within one year" from the date of the lease, and if they made default in the performance of this first covenant, that is, if they did not sink a shaft, etc., and be mining coal within one year, etc., they agreed to pay the lessor, in the nature of a penalty, the sum of $100 per month "until such shaft or tunnel or drift shall be put into operation." This first covenant is certainly not the covenant or agreement upon which the appellee sued in this action, and it seems to us to be entirely independent of the next succeeding covenant or agreement, which fixes the minimum rent and prescribes the amount of royalty reserved under said lease. Fairly construed, the provisions of the lease above quoted bound the lessees, in our opinion, to the payment of the fixed minimum rent of one hundred dollars per month, in any event, after they had sunk a shaft, etc., and were mining coal, and to the payment of a royalty of "twenty-five cents per ton of 2,040 pounds," with the agreement, however, that if the royalty upon the coal mined in any one year, at the rate aforesaid, should amount in the aggregate to more than the sum of $1,200, the minimum rent of $100 per month should be applied in payment of such aggregate sum, and the lessees should only be required to pay the excess of the royalty, as such, over and above the said sum of twelve hundred dollars.

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Under this construction of lessees' covenants and agreements, in the lease in suit, which seems to us to be the fair and reasonable construction thereof, it is very clear that the appellee's complaint in this case stated facts sufficient to constitute a cause of action against the appellant as the assignee of the lessees in such lease. It appeared from the allegations of the complaint, that in less than one month after the date of the lease, the lessees therein sold and transferred such lease to the appellant, by their written assignment thereof; that, in pursuance of said lease and assignment, the appellant had immediately taken possession of the land demised, and of the coal strata thereunder, and commenced to dig, mine and remove the coal from under said land, and had ever since, from that date to the day of the commencement of this suit, December 6, 1877, been in the possession of said land and coal strata, and in the peaceable enjoyment thereof, digging and mining said coal. Under these allegations of the complaint, it is certain, we think, that the appellant, as the assignee of the lessees in the lease in suit, is liable to the appellee, the lessor, for the minimum rent of one hundred dollars per month for the fourteen months mentioned in the complaint, and during which the appellant, as alleged, was in the peaceable enjoyment and possession of the demised premises, under the lease, digging and mining coal. For, although there was no privity of contract between the appellee, the lessor, and the appellant, as the assignee of the lessees, yet there was a privity of estate between them as long as the appellant remained in possession of the demised premises, which created a debt for the rent or royalty reserved in the lease, in favor of the appellee and against the appellant: *Howland* v. *Coffin*, 9 Pick. 52; *Gordon* v. *George*, 12 Ind. 408; *Carley* v. *Lewis*, 24 Ind. 23; *McDowell* v. *Hendrix*, 67 Ind. 513.

Our conclusion is that the court committed no error in the case at bar in overruling the appellant's demurrer to appellee's complaint.

The evidence introduced by the parties on the trial of this cause was not made a part of the record now before us. Under the alleged error of the trial court in overruling the appellant's motion for a new trial, only a single supposed erroneous decision has been so saved in the record as to present any question for the decision of this court. It appears from

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a bill of exceptions set out in the record that the appellant, at the proper time, introduced one Thomas Watson, a competent witness, who testified, among other things, that the minable coal under the demised lands of the appellee had been exhausted and mined out before the advanced royalty mentioned in the complaint had accrued, and that the appellant had fully paid the appellee, before the commencement of this suit, the stipulated royalty mentioned in said lease, on all coal dug and mined under said land; and that the appellant further offered to prove by said witness the entire quantity of coal mined and paid for under appellee's land, up to the commencement of the suit, and also offered at the proper time, to prove the same facts by Albert Watts, another competent witness. The bill of exceptions shows that the appellee objected to the introduction of the offered testimony, upon the ground that it was irrelevant and immaterial, which objection the court sustained, unless the appellant would further prove that it had, in any year, mined coal, the royalty on which would exceed the stipulated annuity of $1,200, and that "the court refused to permit either of said witnesses to testify to said facts."

The record of this cause fails to disclose the object or purpose for which the excluded evidence was offered by the appellant. It was not relevant, certainly, to the issues in the cause; for these had reference only to the minimum rent of $100 per month. The appellee sued for the recovery of the monthly rent reserved in the lease, of $100 for each month, which was to be paid in any event, and without regard to the quantity of coal mined, and he asserted no claim for royalty in excess of the minimum monthly rent, upon the issues joined in the cause; it seems to us that the facts which the appellant offered to prove, were wholly irrelevant and immaterial; and, in the absence of the evidence from the record, we can not say that those facts became relevant or material by reason of any matter occurring at the trial. The record fails to show, we think, that the court committed any error in overruling the appellant's motion for a new trial, and, therefore, as all the presumptions are in favor of the correctness of the court's ruling, we are bound to say that the trial court did not err in such ruling or decision: *Myers* v. *Murphy*, 60 Ind. 282; *Stott* v. *Smith*, 70 Ind. 298; *Bowen* v. *Pollard*, 71 Ind. 177.

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We find no error in the record of this cause, which will authorize or justify the reversal of the judgment below.

The judgment is affirmed at the appellant's costs.

1. Where, under the grant, an estate passes, or the grantee could bring ejectment and has the right of possession, the instrument is a lease and not a license: *Knight* v. *Indiana Co.*, 47 Ind. 105, 17 A. R. 692.

2. Distinction between lease and license: *Boone* v. *Stover*, 9 M. R. 326.

3. Agreement to lease oil lands, *held*, to pass a corporeal interest: *Chicago Co.* v. *U. S. Petroleum Co.*, 57 Pa. St. 83; *Post* RECEIVER; and see *Hoeveler* v. *Mugele*, 66 Pa. St. 348; *Post* VENDOR AND PURCHASER; *Contra*, *Union Co.* v. *Bliven Co.*, 3 M. R. 107.

4. The extent of the demise, a question for the jury: Eviction by lessor: *Tiley* v. *Moyers*, 4 M. R. 320.

5. Duration of the term where not expressed, may be fixed by intrinsic or extrinsic circumstances: *Horner* v. *Leeds*, 25 N. J. L. 106.

6. Mining by a lessee under a mining lease is not waste, nor does his failure to pay the rent make it so: *Heil* v. *Strong*, 44 Pa. St. 264.

7. Irregular contract construed as lease: *Gartside* v. *Outley*, 58 Ill. 210; *Post* MORTGAGE; *Horner* v. *Leeds*, 25 N. J. L. 106.

8. Lease of vein of coal supposed to exist on a certain farm: *Jefferys* v. *Fairs*, L. R. 4 Ch. Div. 448; *Post* SPECIFIC PERFORMANCE.

9. Contract for lease sufficiently definite to be enforced: *Haywood* v. *Cope*, 6 M. R. 499.

10. Specific performance of agreement for a lease refused because the agreement was indefinite, and without assurance that the undertaking would be carried out: *Lancaster* v. *De Trafford*, 31 L. J. Ch. 554.

11. A lease of land and mines will cover both opened and unopened mines: *Saunders' Case*, 5 Coke, 12.

12. Decree for the execution of a lease according to the terms of an agreement: *Taylor* v. *Salmon*, 4 Myl. & Cr. 134.

13. Instrument construed to be an agreement for a lease rather than a lease: *Doe* v. *Powell*, 8 Scott, N. R. 687, 7 M. & G. 980.

14. Lease of surface in connection with contract as to working the mine: *Shaw* v. *Wallace*, 25 N. J. L., 453; *Post* TRESPASS.

15. An agreement for a lease to contain "all usual and customary mining clauses" construed: *Hodgkinson* v. *Crowe*, L. R. 19 Eq. 591; L. R. 10, Ch. App. 622.

16. Construction of leases containing numerous covenants: *James* v. *Cochrane*, 7 Ex. 170; 8 Id. 556; *Friar* v. *Grey*, 15 Q. B. 901; 5 Ex. 584.

17. Construction of lease of iron works as to the time of notice of surrender: *Bridges* v. *Potts*, 17 C. B. N. S. 314.

18. Construction of lease and contract concerning marble quarry: *Flint* v. *Eureka Marble Co.*, 53 Vt. 669; *Post* PARTNERSHIP.

19. Construction and enforcement of agreement by lessees to purchase: *Suffern* v. *Butler*, 3 M. R. 22.

20. Covenant to pay "for all screened coal" construed: *Williams* v. *Summers*, 45 Ind. 532; *Post* WEIGHTS AND MEASURES.

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21. Parol evidence not allowed to show what quantity lessee agreed to mine: *Lyon* v. *Miller*, 24 Pa. St. 392; *Post* MEASURE OF DAMAGES.

22. Lessee must deliver his royalties in marketable condition: *Audenried* v. *Woodward*, 28 N. J. L. 265; *Post* RENTS.

23. Covenant enforced to pay for coal, whether got or not: *Mellers* v. *Devonshire*, 16 Beav. 252.

24. Simple covenant distinguished from condition working forfeiture: *McKnight* v. *Kreutz*, 6 M. R. 305; *Vanatta* v. *Brewer*, 6 M. R. 358.

25. A lease of coal mines provided that nothing thereby granted should injure the right of parties who had a right to obtain alum from the coal wastes. *Held*, that as the removal of the pillars which supported the roof would render it impossible to reach the alum, the lessees of the coal could not remove them: *Glasgow* v. *Hurlet Alum Co.*, 3 H. L. Cases 25; 8 Eng. L. & Eq. 13.

26. Working coal by instroke, is working in a proper and workmanlike manner: *Lewis* v. *Fothergill*, L. R. 5 Ch. App. 103; *Post* WORKINGS.

27. Presumption that workings took place under lease, and were authorized: *Elias* v. *Snowdon Slate Quarries Co.*, 48 L. J. Ch. 811; *Post* WASTE.

28. Covenant to work mines in a workmanlike manner not broken by failure to work mines altogether: *Quarrington* v. *Arthur*, 10 M. & W. 335; *Post* WORKINGS.

29. Partner negotiating lease and stipulating for private advantage. *Held*, to be trustee for his partners: *Fawcett* v. *Whitehouse*, 1 Russ. & M. 132; *Post* PARTNERSHIP.

30. The lease of mining associates is partnership assets: *Patterson* v. *Silliman*, 28 Pa. St. 304; *Post* PARTNER.

31. Right of single partner to refuse to renew lease: *Phillips* v. *Reeder*, 18 N. J. Eq. 95; *Post* PARTNER.

32. Relief where the oil well intended was not included in the bounds demised: *Mays* v. *Dwight*, 82 Pa. St. 462; *Post* MISTAKE.

33. Cancellation of lease obtained through fraudulent conduct of board of directors: *Mahony* v. *Bennett*, 7 M. R. 133.

34. Fraudulent delay of lessee in digging coal to postpone rent day under contract: *Green* v. *Sparrow*, 3 Swanst. 408; *Post* RENTS.

35. Party seeking to enforce a supposed forfeiture of a lease can not have a receiver appointed: *Oil Co.* v. *Petroleum Co.*, 6 Phila. 521; *Post* RECEIVER.

36. Facts held sufficient to justify re-entry for breach of the covenant to work steadily: *Stockbridge Co.* v. *Cone Iron Works*, 6 M. R. 317.

37. Abandonment of works held to be a breach of covenant to work mine in a prudent and workmanlike manner, though the jury found that the mine could not be worked in any reasonable way owing to an influx of brine: *Jervis* v. *Tomkinson*, 1 H. & N. 195.

38. On forfeiture of lease, sub-lessee's rights are gone, but if lessor accept a surrender from lessee, the sub-lessee's rights remain: *Great Western Railway Co.* v. *Smith*, L. R., 2 Ch. Div. 235.

39. Mechanic's lien against leasehold interest: *Dobschuetz* v. *Holliday*, 6 M. R. 108; *Vandergrift's App.*, 9 M. R 397.

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40. Lessor can not recover on the lease for coal mined beyond the set; he must sue in trespass: *Lyon* v. *Miller*, 24 Pa. St. 392; *Post* MEAS. D.

41. The tenant of a mine can not set up any outstanding title or government proprietorship against his lessor: *Wilson* v. *Smith*, 5 Yerger (Tenn.), 379.

42. Circumstances of misapprehension as to the land demised may exist which will operate to allow tenant to deny the title of his lessor: *Wyoming Coal Co.* v. *Price*, 81 Pa. St. 156.

43. Case of the vein demised leaving the lessor's bounds: *Sobey* v. *Thomas*, 4 M. R. 359.

44. Lessor not liable for tenant's negligence: *Offerman* v. *Starr*, 2 Pa. St. 394; *Post* NEGLIGENCE.

45. Recoupment and set-off between lessor and lessee: *Tiley* v. *Moyers*, 4 M. R. 320.

46. Merger of lease: *Logan* v. *Green*, 4 Iredell's Eq. 370; *Post* MERGER.

47. A privilege to the lessee of doing such quarrying on the demised premises as was necessary to carry on his business as a boat builder, *held* to confer a property in the rock so quarried: *McKee* v. *Brooks*, 20 Mo. 526.

48. Sale of land subject to lease containing a covenant of renewal passes the right of renewal to the grantee, and he is not bound by renewal made by his grantor: *Norton* v. *Snyder*, 2 Hun (N. Y.), 82.

49. Special power to two thirds of shareholders, by which they lease the whole company property: *Featherstonhaugh* v. *Lee Moor Porcelain Clay Co.*, 3 M. R. 496.

50. Lessor or reversioner of lands leased for agricultural purposes has a right of action for injury done to the inheritance by removal of stone from quarry: *Freer* v. *Stottenbur*, 2 Abb. App. (N. Y.), 189. See *Bannon* v. *Mitchell*, 2 M. R. 108.

51. Miners' houses, *held*, appurtenant to lease: *Spencer* v. *Kunkle*, 2 M. R. 18.

52. Partnership between lessees of coal pits: *Burdon* v. *Barkus*, 4 DeG. F. & J., 42; *Post* PARTNERSHIP.

53. False representations affecting agreement for lease of coal mines: *Clapham* v. *Shillito*, 6 M. R. 431.

54. Partners in mining lease precluded by laches from obtaining relief against enforced dissolution: *Clegg* v *Edmondson*, 8 M. R. 180.

55. Covenant against cutting trees in a lease of lands with privilege of quarrying, *held*, not to forbid the grubbing up of saplings and underwood for the necessary purpose of working the quarry: *Doe* v. *Price*, 8 C. B. 894.

56. Agreement for a lease of copper works with easement to take superfluous water from lessor's canal: *Bankart* v. *Tennant*, L. R. 10 Eq. 141.

57. Lease to partners not evidence of agreement to continue partnership during term of lease: *Crawshay* v. *Maule*, 1 Swans. 495; *Post* PARTNERSHIP.

58. Right of lessee to brick earth dug by stranger: *Attersoll* v. *Stevens*, 1 Taunt. 183; *Post* MEASURE OF DAMAGES.

59. Order of working upper and lower collieries: *Abinger* v. *Ashton*, 6 M. R. 1.

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60. Terms of lease so construed as to give right to lessees to undermine surface, upon payment of damages: *Smith* v. *Darby*, L. R., 7 Q. B. 716; *Post* SURFACE SUPPORT.

61. Covenant for quiet enjoyment is implied in a lease: *Owens* v. *Wight*, 1 W. C. R. 541.

62. Remedy to lessee against landlord for wrongful entry is by action at law for damages and not for an accounting. *Id.*

63. Lease of all the clay is not a lease of the land itself, but carries all necessary possession: *Scioto Fire Brick Co.* v. *Pond*, 38 Ohio St. 65.

64. Construction of covenant by lessee to take out all the ore in vein of certain thickness: *Gilmore* v. *Ontario Iron Co.*, 86 N. Y. 455. Covenant for minimum rent: *Id.*; *Tod* v. *Stambaugh*, 37 Ohio St. 469.

65. Lessee paying royalty only on iron ore but to hold the lands "as in fee simple" may dig limestone: *Watterson* v. *Reynolds*, 95 Pa. St. 474; 40 Am. R. 672.

66. Facts justifying presumption that lease was abandoned: *Porter* v. *Noyes*, 47 Mich. 55.

67. Purchaser of lease at execution sale takes lessee's place: *Huddell, in re*, 16 Fed. 373.

68. A lease provided for valuation of fixtures and payment three months before expiration of term, etc. It became forfeit for default in rent. *Held*, that tenant lost his right to payment: *Storer* v. *Hunter*, 3 B. & C. 368.

69. Covenant to tear down and keep in repair, implies covenant to build anew: *Sampson* v. *Easterby*, 9 B. & C. 505; 6 Bing. 644.

70. The receipt of rent may create a tenancy, though the lease under which it was paid was void: *Doe* v. *Morse*, 1 Barn. & Ad. 365.

71. Correspondence, stipulating for a lease, does not amount to a present demise: *Jones* v. *Reynolds*, 1 Q. B. 507.

72. Party leasing land from strangers to the title, liable for the rents: *Hawseville* v. *Hawse*, 7 M. R. 193.

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CLAYTON V. GREGSON.

(4 Nev. & Man. 602; 6 Id. 694; 5 Ad. & El. 302. King's Bench, 1835.)

Evidence of local meaning of "level." In an action for breach of a covenant, in a lease of coal mines, to get the whole of the veins of coal lying under certain closes, "not deeper than or below the level of the bottom of the mine," at a certain point, evidence is receivable to show that by the miners in the neighborhood the word "level" is used in a certain peculiar sense.

The word "level" when used as a mining term, in the coal district of Lancashire refers to the inclination of the strata, and not to a horizontal plane. The expression "below the level of the bottom of the mine" explained accordingly.

Non-residents using local phrases. When the parties to a mining lease are not all residents of the district, it is not a conclusion of law that words in their contract were used with the local meaning attached to them by the custom of the district where the mines, the subject-matter of the contract, are situate.

Whether words are used in a local or in a general sense is a question for the jury.

Covenant upon an indenture of lease of certain coal mines and lands and tenements in the parishes of Blackrod and Adlington, Lancashire. One of the covenants on the part of the defendant was, that he would, before the 30th December, 1832, get the whole and every part of the demised mines, beds and veins of coal, lying in or under the messuages, tenements, closes, etc., therein before mentioned, to be situated in Blackrod, not deeper than or below the level of the bottom of the said mine, bed or vein of coal, called the Arley mine, under a certain part or point (marked, in the plan thereupon indorsed, with the letter A) of the close in Blackrod aforesaid, called the Nearer Oldfield. The covenant then goes on more particularly to describe the point stated to be marked "A" in the plan, and provides that for all such parts of the several demised mines as the defendant therein covenanted to get, the reserved rent (which was at the rate of so much per acre of coal) should be paid, whether the coal were gotten or not. Breach: That the defendant did not, before 30th December, 1832, get the whole of the mines under the said closes, etc.,

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in Blackrod, not deeper than or below the level of the bottom of said mine, called the Arley mine, under the said point marked A; and that on 30th December, 1832, one hundred acres of each of the several mines lying not deeper than or below as aforesaid, remained ungotten, and thereupon £62,000, being according to the rate per acre, became due to the plaintiff.

At the Lancashire spring assizes, in 1834, the cause was tried before ALDERSON, J., when a verdict for 1*s.* damages was taken by consent, upon breaches of other covenants; and upon the breach above mentioned, the main question ultimately turned upon the meaning of the expression "not deeper than or below the level of the bottom of," etc. The plaintiff contended that the word "level" must, in the absence of any latent ambiguity necessarily be taken to mean "horizontal level," and that therefore the defendant was bound by the covenant to get all such parts of the mines as were not below the horizontal level of that point of the bottom of the Arley mine, which corresponded to the point of the surface of the earth marked "A" in the plan. The defendant's counsel contended, that in the understanding of miners, the expression had a different meaning, and that this being a mining lease, the expression ought to be taken in its technical and not in its popular sense, and they proposed to call witnesses acquainted with the art of mining, as it was exercised in the neighboring country, to show the peculiar meaning attached to the expression by miners. 3 Starkie on Evidence, 1028, *et seq.*, and *Smith* v. *Wilson*, 3 Barn. & Adol. 728, and other cases were cited.

The learned judge, though not free from doubt upon the question as to admissibility of this evidence, rejected it.

It was then agreed between the parties, that according to the construction put upon the covenant by the plaintiff, he was entitled to £22,000 damages; but that, according to the defendant's construction of it, the damages ought to be £5,000 and no more. It was further agreed that the question as to the admissibility of the evidence should be submitted to this court, upon a motion to reduce the damages, or for a new trial; and that in case this court should be of opinion that the evidence ought to have been received, a legal arbitrator should

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be appointed to hear the evidence, and to determine whether the defendant's construction of the covenant was or was not correct, according to the understanding of miners; the verdict to be reduced to £5,000, or to stand for £22,000, accordingly. This arrangement having been communicated to the judge, his lordship directed the jury to find a verdict for £22,000, which they accordingly did.

In Easter term, 1834, F. POLLOCK obtained a rule *nisi* to reduce the damages to £5,000 or for a new trial.

COLTMAN and COWLING now showed cause.—Unless, upon looking at the terms of the covenant taken by itself or in connection with the rest of the deed, the court can perceive an ambiguity, parol evidence ought not to be received. Where words of doubtful import are used, evidence may be received for the purpose of applying the instrument to its proper subject-matter; and in general where terms are used in a peculiar sense by mercantile men, parol evidence may be received to interpret them; but this exception to the general rule is, even in the cases of mercantile contracts, limited to those cases in which, upon the face of the contract, something of a doubt is raised by the use of the words. Where in a mercantile contract, or in a contract made between persons of a particular class, words are used which are ordinary expressions, having in the English language precise and well known meaning, evidence can not properly be received for the purpose of showing that among the merchants, or the particular class of persons, those words are used in a distorted sense. This limitation of the rule above alluded to is in itself founded on good sense, and is to be deduced as a rule of law from the observations of the courts and judges in *Baker* v. *Paine*, 1 Vezey, Sen., 456; *Blunt* v. *Cumyns*, 2 Vezey, Sen., 331; *Anderson* v. *Pitcher*, 2 Bos. & Pull. 164; *Cross* v. *Eglin*, 2 Barn. & Adol. 106; *Attorney General* v. *Cast Plate Glass Company*, 1 Anst. 39. The rule, indeed, with this limitation, is in effect a branch of the rule, that where an ambiguity appears upon the contract, parol evidence may be received for the purpose of directing its application. There are certain cases, as that of *Smith* v. *Wilson*, 3 Barn. & Adol. 728, (in which evidence was received to show that by the custom of the country, where a certain lease of a rabbit warren was

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made, a "thousand rabbits" meant 1,200 rabbits,) which have decided that where terms of number and measure are used in contracts, evidence may be received to show that by the custom of the particular country or trade, they are used in a peculiar sense. But terms of number and measure stand alone in this respect, the rule with regard to them having been relaxed, probably owing to certain acts of Parliament having treated them as capable of bearing various senses, according to the subject-matter, the trade or the locality.

Sir F. POLLOCK, with whom were WIGHTMAN and ADDISON, *contra*, was, in the early part of his argument, stopped by the court.

Lord DENMAN, C. J.—We are all of opinion that the evidence was receivable. "Level" does not appear to me to be in itself a word which has any particular meaning attached to it under all circumstances; and therefore in order to know what these parties meant, the evidence should have been received; with the effect of the evidence when received, we have nothing to do. It is enough to say that the word level, being used by parties with reference to that which is in the nature of a trade, in which it may consistently with its general meaning have a peculiar meaning, it was necessary to hear from witnesses what the meaning was. I am not sure that the doctrine has not been carried further than that. It is not necessary to go further, however, in a case of this sort, where the word is both to a certain degree ambiguous, and is clearly a technical term with reference to the subject-matter.

LITTLEDALE, J.—I do not think this is a question so much about latent ambiguity as it is about the construction of a word in the English language. I do not think it can be said that in ordinary language the word "level" invariably means "horizontal" or "horizontal line." It is like many other words in our language, which have various meanings, according to the subject-matter to which they are applied, or the parties by whom they are used. The same word may have twenty different meanings.

PATTESON, J.—This is the case of a mining lease, and the word must be construed, *secundum subjectam materiam*, as a mining word. *We* do not know what the meaning is. Evidence ought therefore to be received. See Hob., 169; 1 Roll. Abr. 86; 1 Danv. Abr. 161.

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COLERIDGE, J., concurred.

A question having been put to the court as to the form of the rule—

Lord DENMAN, C. J.—We have nothing to say except that the inquiry should proceed. The evidence appearing to us to be receivable, for the purpose of showing in what sense the parties to this instrument used the term, it must be referred to the arbitrator, to decide upon the effect of the evidence.

PATTESON, J.—The question is not to be confined to the ordinary meaning of the specific word "level" at all; it is here necessary to ascertain what the meaning of the term is locally.

Mr. STARKIE, the arbitrator, subsequently made the following award or statement:

"By virtue of a rule of this honorable court made in this cause, on the 27th April, 1835, I, the arbitrator in the said rule mentioned, having received evidence of the meaning of the covenant on which the fifth breach in the declaration in the said cause is assigned, according to the custom and understanding of miners, find and state, as the effect of such evidence, that the coal mines mentioned in the pleadings are situate within an extensive coal mining district, in the county of Lancaster. That according to the custom and understanding of miners throughout that district, a coal level or water level is a drift, way or passage running horizontally, or nearly so, within a stratum of coal, some small degree of inclination being allowed for carrying off the water, and subject to such small variance in inclination, is determined by a horizontal line drawn within the stratum, or, which is the same thing, by a line coincident with the stratum, at right angles to the inclination or dip of the stratum, and that the level of the bottom of a mine, under the given point (A), is the water level or coal level, so drawn within the stratum from the intersection of a perpendicular from (A) with that mine, and is in like manner determined by a horizontal line drawn through such intersection, coincident with the plane of the stratum. That according to the custom and understanding throughout that district, the terms "deeper than" and "below" do not depend upon relative perpendicular depth below the surface, but upon the inclina-

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tion of the strata and power of drainage. That a vertical plane being drawn through any point in a stratum of coal, coincident with any coal level or water level, and intersecting several strata, all such parts of the intersected strata as lie on the dip side of such vertical plane, that is, on the side of the plane on which the strata of coal descend from the intersections with such vertical plane, are said to be deeper than or below any of the coal or parts of the intersected strata which are on the other side the rise or ascending side of such vertical plane. That according to such custom and understanding throughout the said district, the covenant on which the said fifth breach is assigned is to be thus construed and understood, and the coals not deeper than or below the level of the bottom of the Arley mine, are to be thus ascertained and determined: A vertical plane is to be drawn through the point (A), coincident with the level of the bottom of the Arley mine, under the point (A), as above determined, that is, coincident with the horizontal line, drawn in the plane of the Arley mine, through the point where the perpendicular from (A) intersects the Arley mine, and all such portions of the intersected strata as lie on the dip side of such plane are deeper than or below the level of the bottom of the Arley mine, under the point (A); but all on the rise or ascending side of such vertical plane are not deeper than or below the level of the bottom of the Arley mine, under the point (A).

A special case was then stated.

The question for the opinion of the court was whether the damages were to remain £22,000 or to be reduced to £5,000 or whether a new trial should be granted.

Lord DENMAN C. J.—This case refers to us for judgment, either that the verdict should stand for £22,000, or be reduced to £5,000, or that there should be a new trial. If the evidence had been properly rejected, the damages were to stand for £22,000. We are clearly of opinion that it was fit to be received, and that the jury ought to have decided on the effect of the evidence. It is a matter for the jury to say what was the contract between the parties, and not an inference of law. From what I have said it follows that the case must go down for a new trial. I am very sorry that it should be so, as the object of the arrangement as to the amount of damages and of

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the reference to arbitration was to prevent further expense. The award does not decide that which it was expected to decide. The reference was as to the meaning of the covenant, according to the custom and understanding of miners generally. If the learned arbitrator had followed the words of the reference, the expected result might have followed. As it is, he has felt it his duty to qualify his finding, and it may be that other evidence of different customs elsewhere might have been given. It appears from the description of the residence of the parties in the deed, that for the most part they lived at a distance from the mines. They may not have known the custom of the district. We can not say that any inference of law, such as that suggested, arises from this finding. It was a question of fact for the jury.

LITTLEDALE, J.—The verdict can not stand for £22,000, because that assessment of damages proceeds on the supposition that the evidence was not receivable. We determined that the evidence was receivable. Then instead of sending the case for a new trial, it was referred to an arbitrator to ascertain the meaning of the word "level." The reference is in very general terms, and a finding accordingly would have given the general meaning in the language of England, of the word "level" with reference to coal mines. If the finding of the arbitrator had been according to the custom and understanding of miners generally, the award would have been sufficient to enable us to give judgment for £5,000. But upon this finding we can not infer, as a matter of law, that the contracting parties used the word with reference to the understanding of the particular district. The fact of confining the statement of the custom to the particular district, seems as much as to say that in other coal mine districts the word level has a different meaning. This being so, it should appear as a fact that the parties did use the word in the sense attached to it within the particular district. It appears from the deed that two of the lessors and one of the lessees resided in a different district. They might not know the custom of the country. The term may have been used in the local sense, but that is not found as a fact, and it does not follow as an inference of law. We are not in a situation to give judgment for either £22,000 or £5,000. There must be a new trial that the facts may be found more precisely.

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PATTESON, J.—I much regret it, but I do not see how we can do otherwise than send the case to another jury. Unfortunately the rule of court does not give the arbitrator power to find in what sense the parties used this term. If it had been a matter of law that the parties to a lease are to be taken to use words in the sense in which they are used in that part of the country where the subject-matter of the lease is situated, then we might have given judgment. I know no case in which the court have gone that length. The utmost that we can say is that the fact of the word "level" being used in a certain sense within the particular district, is evidence, very strong evidence, that the parties used it in that sense. It is for the jury to determine whether in fact the parties did so use the term. If the arbitrator had left out the words "in that district," it might have been easier to come to a conclusion.

WILLIAMS, J., concurred.

Rule absolute for a new trial.

The case was afterward compromised.

1. Covenant not to communicate with levels of other collieries is usual in colliery leases: *Beaumont* v. *Boultbee*, 1 M. R. 260.

2. The term "level" means a working and is not necessarily a plane; *Brain* v. *Harris*, 10 Ex. 908.

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PAULL v. HALFERTY.

(63 Pennsylvania State, 46. Supreme Court, 1869

[1] **Slanderer of mine, liable in damages.** Where one knowing more than others of the occult qualities or internal values of land, and knowing or believing the condition to be one thing he represents the facts differently, to the prejudice of the owner, he is liable in damages.

Sale prevented by officious libel. Where one has been prevented from selling his land or other property by the malicious interference of another he may maintain his action for the damage suffered.

Describing mine as pockety. Where the plaintiff, being in negotiation for the sale of a tract of iron land, the purchase was broken off upon the statement (proved to be false) of the defendant, by letter, that the mine was a "pocket," and that "the ore was nearly played out:" *Held*, that the defendant was liable in damages.

Remedy in tort for the libel—Against vendee, on contract. If there had been a contract for the purchase of the land, binding upon the vendee, and he had refused to comply, being biased by such false representations, the remedy of the plaintiff would have been against the intending purchaser on his contract.

October 29, 1869. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of Westmoreland County, No. 178, to October and November term, 1869.

This was an action on the case, commenced September 8, 1866, by Edward L. Halferty against George T. Paull. The plaintiff declared that he was seized in fee of a tract of land having in it valuable deposits of iron ore; that he was negotiating for the sale of the tract with one John Y. McLaughlin, and that McLaughlin "concluded to purchase for $6,000;" that the defendant, having been informed of the negotiation, and "contriving, and falsely and maliciously intending to injure the plaintiff, and to cause and induce the said John Y. McLaughlin to believe that there was but little iron ore in said tract of land, and thereby to hinder and prevent the plaintiff from selling his estate and interest in said tract of land to the said John Y. McLaughlin, or any other person, and to cause the plaintiff to lose and be deprived of divers great gains, which he might and otherwise would have reaped and derived

[1] In slander of title special damage must be averred and proved: *Kendall* v. *Stone*, 5 N. Y. 14; and malice: *Walden* v. *Peters*, 2 Rob. 321; 38 Am. Dec. 213.

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from the said sale, and to cause the same to be sold for a much less price than the said sum of $6,000, or than the same otherwise would have realized and produced, and to vex, harass and oppress the plaintiff;" informed McLaughlin by a letter (set out at large in the declaration), that he had been informed by a practical iron master that the ore would run out suddenly: that "the ore was nearly played out," etc. By means whereof "McLaughlin, who was about to become the purchaser of the said tract of land, and the iron ore therein, and who might and otherwise would have purchased the same, was induced to believe that the deposit of iron ore in said tract of land was nearly exhausted, etc., and that by means of the said several grievances McLaughlin was deterred and prevented from becoming the purchaser of the said estate and interest of the said plaintiff in said tract of land; and McLaughlin wholly declined to purchase the same, etc., and thereby the plaintiff was hindered and prevented from selling and disposing of said tract of land to McLaughlin, and hath thereby been deprived of all the advantages and emoluments which he might and otherwise would have derived from the sale thereof to McLaughlin; hath been also otherwise greatly injured and damnified," etc.

On the trial, before BUFFINGTON, P. J., March 31, 1869, the plaintiff proved his title, and then gave evidence by McLaughlin, who resided in Pittsburg, that before his negotiation with plaintiff, for the purchase of the land, the defendant told him that the ore banks were very valuable, etc.; that afterward the plaintiff offered the land to witness for $6,000, and witness told the plaintiff he would take it. After the witness had gone home, he received the following letter from the defendant:

"As we parted the other day, you said something of buying the tract of land containing the ore mine. Now, in order that you may be fully posted before purchasing a 'pig in a poke,' I will give you Col. Mathiot's opinion of that iron ore deposit. Col. Mathiot, a shrewd, practical man, well known in Pittsburg, who managed this furnace for thirty years, considered it an isolated 'pocket' or 'nest,' as miners call them, that would run out suddenly, and this he gave for as one reason for always using it, in connection with other ore (to save it); but at the same time they found that the furnace worked better on mixed ore.

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"And when, some five years ago, I inquired of him, how he come to let that tract be sold for taxes, he replied that he had got all the timber off it, and thought the ore was nearly played out, and, although I thought he was mistaken, he said he was sustained by Arthur Harrison, a miner, who had worked in it. I have not mentioned this before to any one."

The witness testified that the letter prevented him from buying.

There was other evidence of the defendant's previous statements to McLaughlin, that the ore banks were valuable, etc. There was also evidence as to the value of the land, the quality of the ore, the probabilities of its being exhausted, etc.

The defendant gave evidence tending to show that the land was of little value, and also that his letter had been written for the purpose of giving McLaughlin "friendly advice."

The defendant submitted these points, viz.:

"2. Land is not the subject of defamation, as offices, trades, professions and titles are, because the land itself is a standing refutation of any false statements in regard to it, so that it can not be injured by them.

"3. If the plaintiff in this case sustained any injury from the loss of his bargain, his remedy is against J. Y. McLaughlin for non-performance of his contract to purchase the land for the price agreed upon."

The court answered the first point in the negative and the third as follows:

"Although plaintiff might have a cause of action against McLaughlin, it would, it does not follow that he could not also support an action against Paull. It is not a case of election or choice of remedies, but being of a separate character, both might be sustained. We therefore answer this in the negative."

The court also reserved the point whether it was "the right of the plaintiff to recover under all the facts."

The jury found for the plaintiff $997.50, and the court entered judgment on the verdict.

The defendant took a writ of error, and assigned for error, entering judgment on the verdict on the reserved point and the answers to his points.

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E. COWAN, with whom were J. A. HUNTER and H. D. FOSTER, for plaintiff in error.—There is no precedent of an action for such cause, which is evidence that it can not be maintained: *Good* v. *Mylin*, 8 Barr, 56. There was no evidence that the defendant's letter was false. If the letter was false, and there was a contract with McLaughlin, he could not have depended upon it; the plaintiff had his remedy against McLaughlin on the contract; if there was no contract, plaintiff lost nothing. The damages would be measured by the consideration: *McNair* v. *Compton*, 11 Casey, 23.

H. P. LAIRD, with whom was MARCHAND, for defendant in error.—Wherever there is a right, there is a remedy by action: 1 Chitty's Pl. 96. Where one is prevented from disposing of his land by the impertinent interference of another, he may maintain an action: 1 Starkie on Slander, 191; *Smead* v. *Badley*, Cro. Jac. 397; *Pennyman* v. *Rabanks*, Cro. Eliz. 427; *Tasbugh* v. *Day*, Cro. Jac. 484; *Gerrard* v. *Dickenson*, Cro. Eliz. 197; *Manning* v. *Avery*, Keb. 153; *Lowe* v. *Harewood*, Sir W. Jones, 196; *Cine* v. *Goulding*, Styles' Rep. 169; *Malachy* v. *Soper*, 3 Bingham (N. C.), 371; *Pater* v. *Baker*, 3 Com. B. 831. An action will lie for breach of contract, and also against the slanderer: *Moody* v. *Baker*, 5 Cowen, 351. It was not on the plaintiff to prove that the allegations of the letter were not true: *Watson* v. *Reynolds*, 1 Moody & Malkin, 1; *Sutton* v. *Johnstone*, 1 Term, 493; *Bendish* v. *Lindsey*, 11 Modern, 194.

The opinion of the court was delivered January 3, 1870, by THOMPSON, C. J.

This was an action in the nature of an action of slander for defamation of title. The *narr.* charges the defendant with falsely and maliciously misrepresenting the quality of a certain tract of land supposed to contain a large body of iron ore of which the plaintiff alleges he was about to make an advantageous sale, but was prevented by the malicious conduct of the defendant.

A point was propounded to the court below by the counsel of the defendant, praying a charge that "land is not the subject

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of defamation, as offices, trades, professions and titles are, because the land itself is a standing refutation of any false statements in regard to it, so that it can not be injured by them." This the learned judge refused.

The point concedes that an action will lie for defamation of title. The authorities for that are numerous: Cro. Eliz. 196, 427; Cro. Jac. 484; Keb. 153; Styles' Rep. 169; 54 Eng. C. L. 830; to which many others might be added.

It might be true that land can not be so misrepresented as to be the subject of damages where the reference is to its patent qualities. I fancy that a statement, however malicious, that land is without timber, when notoriously well timbered, could never be the subject of damages. But very different would be the case of those occult qualities or internal values which science and experience may be able to detect. As they never, or very rarely, can be certainly ascertained, and to some extent must rest upon opinion, it seems to me that the case is different. One may know more in regard to the value than others, and if, knowing or believing the condition to be one thing, and representing the facts in a different light and prejudicial to the owner, he does him an injury, he ought to pay the damages his misrepresentation produces, or is the direct cause of.

The representation in this cause was, that an experienced iron manufacturer was of opinion that the iron ore in the land was but a "pocket" or nest, that would suddenly run out, and that he had used ore from the bank with other ores in order to save it. This was a most successful mode of depreciating the value of the land as mineral land, and if this was false and malicious as well as injurious to the plaintiff, why shall he not be indemnified? The defendant did not pretend to prove that Col. Mathiot ever did say what he imputed to him, or that the fact, independently of him, was true. The witness, the party in treaty for the land, says that in consequence of this communication from the defendant, having confidence in him, he refused to go on with the purchase, and thus the matter ended. As the use of the words in question was not *in se* actionable, the plaintiff proved their falsity, so far as observation, experience, judgment and the declarations of the defendant could go. This made a case for the jury, and it would, we think, have

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been manifest error in the judge to have affirmed the defendant's point.

It would hardly be denied, I think, if one were falsely and maliciously to represent that a piece of land and residence which a neighbor was about to sell, was very unhealthy, and thus break off an advantageous sale, that this would be actionable if damage was shown.

For misrepresenting personal qualities, such as the imputation of the want of chastity, by which an advantageous marriage was lost, an action lies, although the words employed may not in themselves be actionable. *Moody* v. *Baker*, 5 Cowen, 351, is of this sort, and there are many such in the books. For falsely representing a ship as unseaworthy, an action lies: *Ingram* v. *Lawson*, 9 Car. & P. 326. This, although the seaworthiness of the vessel might be claimed as "a standing refutation" of the slander, being a thing easily ascertained. I regard the text of Starkie on Slander, page 172, Ed. of 1869, as quite to the point in a case of this kind. It is there said, "where a party is prevented from selling, exchanging, or making any advantageous disposition of land or other property, in consequence of the impertinent interference of the defendant, he may maintain an action for the inconvenience he has suffered." Burr. R. 2622 is cited for this by the learned author. With all these analogies and principles to sustain the ruling of the learned judge, we think he committed no error in answering the defendant's first point as he did.

In regard to the second assignment of error, which is the answer of the learned judge to the defendant's second point, much need not be said. It seems to us that if the law, in answer to it, were wrong to any extent, the facts did not raise the question. The defendant's testimony did not refer at all to any completed contract of purchase by McLaughlin from the plaintiff, but he claimed it to have been shown by the plaintiff. But when we look at that, we discover nothing like a contract with any time for performance, and necessary details on either side, even by parol. The preliminaries to a contract were spoken of, nothing more, and this the defendant seemed to understand, for he interposed his notice not to buy a "pig in a poke" in order to prevent its completion. A contract for the sale of land is not made by a statement of the

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price asked and an answer "that I will take it," as said in this case. Arrangements are to be made, as to how and when to be paid, when the conveyance, and what kind of conveyance, is to be made, and then the reduction of the contract to writing and signing it, at least by the party who is to convey. There was neither a parol nor written contract in evidence in this cause, such an one as a court would have allowed to have gone to the jury as a binding contract for the sale of land. I admit that if there had been a binding contract between the plaintiff and McLaughlin, for the land, and then the latter had refused to comply with his contract on account of the defamatory representations received, the authorities show that the plaintiff's remedy would have been on the contract for damages. This is very clearly asserted by Lord Eldon, C. J., in *Morris* v. *Longdale*, 2 Bos. & Pul. 283; see also *Vicars* v. *Wilcocks*, 8 East. 1, and *Bailey* v. *Drew*, 5 Barb. 297. But we need not enlarge; if there were error in this answer, it was innoxious, as the proof did not raise the point.

The learned court entered judgment on the verdict, although it had reserved the question, whether under all the facts the plaintiff was entitled to recover. This was certainly insufficient as a point reserved (*Clark* v. *Wilder*, 1 Casey, 314), and the plaintiff in error can not ask a review here of anything but what he took exceptions to on the trial. We have, however, discussed all the questions in the case.

Judgment affirmed.

WILSON v. FITCH ET AL.

(41 California, 363. Supreme Court, 1871.)

Article libelous on its face. When an article in a newspaper imputes to a person grave offenses and dishonest practices, which, if established, would bring him into general contempt and disgrace, it is actionable on its face.

Proof of colloquium. When an alleged libel is actionable *per se*, and still a colloquium is inserted in the complaint, it is unnecessary to prove the colloquium.

When colloquium not necessary. A colloquium is not necessary, except when the libel is not actionable on its face, but has a covert libelous meaning.

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Evidence of belief in action for libel. In an action for damages for publishing a libel, in which it is stated that the owners of a mine believe that they have been swindled by the plaintiff, testimony that such owners, at the date of the publication, believed that they had been swindled, is not admissible, either in justification or mitigation of damages.

Idem. If the libel assert the defamatory matter, not as a fact, but only as the belief of the author, or as a rumor, or general suspicion, the libel can not be justified by proof that the author believed it to be true, or that there was such a rumor, or general suspicion.

Proving the truth. In order to justify such publications of the belief of the author or of others, the defendant must prove the truth of the matter published.

Privileged communication—Proof of malice. The trustee of a private corporation is not a public officer in such a sense as to enable the publishers of a newspaper to claim an article published concerning him and criticising his conduct as trustee, as a privileged communication, and therefore compel such trustee, in an action for libel, to prove express malice.

Defamatory publication not privileged. A defamatory publication in a public journal, concerning a private person, is not privileged, so as to require proof of express malice on the part of the plaintiff, simply because it relates to a subject of public interest, and was published in good faith, without malice and from laudable motives.

Idem. In such case the publisher, in order to rebut the presumption of express malice, should be allowed the fullest opportunity to show the circumstances under which the publication was made.

Previous publication by others on same subject. In an action for a libel, the defendant can not introduce in evidence libelous articles, published by other persons, before the publication of the alleged libelous article, whether they refer to the same transactions spoken of in the article published by the defendant, or to other matters.

[1] **Common rumor of guilt.** In an action of libel, the defendant can not introduce evidence to show that prior to and up to the time of the publication by defendant, the plaintiff had been generally reported and suspected to have been guilty of the acts imputed to him in the libel.

Verdict against weight of evidence. The appellate court will not disturb the verdict of a jury on the ground that it was not justified by the evidence, when there was a substantial conflict in the testimony, even though it is greatly against the weight of evidence.

Punitive damages. In an action for a libel, if there is no proof of malice or ill-will toward plaintiff, and the publication is made in the usual course of defendant's business as public journalists, in the full belief that the article was true, after a careful inquiry from an apparently reliable source, the plaintiff is not entitled to punitive damages.

Appeal from the District Court of the Twelfth Judicial District, City and County of San Francisco.

[1] *Commons* v. *Walters*, 1 Port. (Ala.) 323.

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The defendants were the editors and proprietors of the *Evening Bulletin*, published in San Francisco. The plaintiff and several others owned a silver mine in the State of Nevada, and were incorporated under the name of the Santiago Mining Company, and the plaintiff became one of the trustees of the corporation. The plaintiff owned and sold stock in the corporation. On the 3d day of November, 1863, the following article was published in the *Bulletin:*

"THE STORY OF A PROMISING MINE.

"A year ago, or more or less, a Mr. Wilson came to town from Washoe, bringing some beautiful specimen bricks and rocks and a straight story as to a mining claim (the Zouave) that he owned, convenient to the Carson river. He was not anxious to sell, though he had some two thousand eight hundred feet in his claim, and it was undoubtedly rich. He had no objection, however, to impart to a few friends the intelligence of the brilliancy of his own prospects. He told his story to Mr. Peachy, of the firm of Halleck, Peachy & Billings, who induced him to let him have, for a short time, the refusal of some four hundred and fifty feet, at sixty-five dollars a foot. Mr. Peachy got the foreman of the California mine (Virginia City) to take a look at the ground, who reported that the prospect was good, and at that price the investment would probably be safe. Mr. Peachy then called upon Lafayette Maynard, telling him that if he would take half of the shares at the price named, he would close the bargain with Wilson. Mr. Maynard consented, and the bargain was completed. A corporation was formed, and the new company, under the name of the Santiago, elected Mr. Maynard its president, who at the time was at Washoe, and, if we are not mistaken, in company with some of the partners visited the old Zouave, now the Santiago mine, descended its incline, entered its galleries already excavated, and saw the gray rock which was alleged to be full of silver. Certainly they saw nothing to make them doubt that everything was as promising as had been represented; for, say what you will, except to experts in rocks, the barren and the rich look exceedingly alike, when underground, by the flickering light of a candle, and even experts speak cautiously on such points when

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any great responsibility attaches to their word. The company was soon under full headway, with, as he deserved to be, Mr. Wilson one of its trustees.

"Measures were taken at once to develop the mine; Mr. Wilson knew of an admirable man for superintendent. The others had no men to name, and so Mr. Wilson's man was chosen. He was instructed to push work with vigor—no capital should be lacking—but to practice economy in all his operations, and faithfully report all that he did or learned. He was to write frequently to the company, and his letters the secretary was ordered to keep in an open drawer, where every stockholder could see them all. Other San Francisco capitalists heard of the good thing, and induced Wilson to let them in. Pioche & Bayerque bought some. The Barrons, who have been for years in mines, got not a little. Men connected with their house, the Barrons, Mr. Bell and Mr. Young, the superintendent of the New Almaden, took among them some eight hundred shares, buying generally at a much higher figure—from one hundred dollars up to one hundred and seventy-five dollars a share. Hall McAllister got some shares, but his were paid for in legal services. Judge Lake got some to the extent of the value of his handsome house on Lombard street. Judge Hoffman bought some. Other men of smaller means, seeing what kind of citizens were putting their money in, bought Santiago, sometimes with all their earnings. The richer owners could not keep them out. When inquired of, they gave the usual advice: 'Don't touch anything in the way of mines, unless you can afford to lose all you invest; it is a lottery.' But they had not the heart to keep a good man poor because he was poor, and, being pressed, they confessed that they believed in Santiago fully, and so the poor men invested, saying example was more cogent than precept, bought as deeply as they could, always of Wilson, but not generally at the highest rates, for Wilson seemed to have a heart under his ribs, and was willing to favor a friend who was struggling. One worthy bookkeeper put in thirteen thousand dollars that he had saved at the desk. The superintendent's reports were always favorable. He generally obeyed orders, and left the adjectives out of his dispatches. He gave 'bare facts,' but the bare facts were heavy

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with silver and weighted with gold; some six hundred feet of the mine had been developed; none of the rock was poorer—most of it richer—than had been anticipated. The company determined not to be misled, ordered him to take seven hundred tons of rock from the open galleries and have it crushed at various mills; let there be no picking—let every pound that went to the surface be ground; they would have an assay on a grand scale that would faithfully show the average yield of their rock. The superintendent soon reported that he had obeyed orders, and the result was forty dollars to the ton! That was magnificent. The buyers at the highest figures wished they had more stock. No one but Wilson would sell an inch, and he was rather yielding, in the goodness of his heart, to the importunities of friends than selling of his own wish, or in accordance with the dictates of his judgment. Mr. Peachy bought more shares, paying at a higher figure this time, and giving for it the house on Rincon Hill, which he had purchased of Mr. Tucker, the jeweler, giving him Wide West stock. The owners thought if custom mills give us forty dollars a ton, with a mill of our own we can get better than that; for such is the faith concerning custom mills the whole land over. They cheerfully agreed to buy, and soon negotiated for a mill on the Carson river, owned by Raymond & Thompson—a mill of fine facilities, convenient to their mine, and of abundant water power. In the mine was an engineer formerly of the California mine, and the old and trusted acquaintance of some of the heaviest owners. This gentleman wrote down to the president that he had taken the responsibility of sending a ton of the average rock to the Mexican mill, which, since the Mexican mine had caved in, was crushing some for customers. This announcement was not welcomed by Wilson. He said the Mexican mill, holding its head very high, refused the privilege, accorded by all others, of allowing a representative from the mine whose ore it crushed to stand by and see that a fair return of the silver and gold was made. He prophesied that if the order was not countermanded, the rock would be reported to yield less than its true measure. He protested against exposing the credit of the mine by any such experiment. The company decided otherwise however. They knew the Mexican mill owners; they

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believed they would deal honorably with their customers; if the rock would not stand its test they wanted to know it. They could pay their debts; they could meet their notes; the stock was not on 'change; they wanted no more credit than the rock entitled them to have. The Mexican crushed its ton, and reported a yield of only thirteen dollars to the ton! This was an eye opener. The mills charge twenty-five dollars a ton for crushing, and it is said to cost full thirteen dollars a ton for a mill to run out a ton. Unless there was some mistake, their mine would ruin them. Investigations followed. It came out that Wilson had sold his shares so far down that, of his original twenty-eight hundred feet, he had but nineteen left! Either he must have lacked the ambition of his fellow owners, or he was trying to get out of a concern which he had all along represented as the richest thing east of the Sierras. Further examination showed that the superintendent and Director Wilson had been in daily confidential correspondence. Wilson said they owned together many other interests, and had a right to correspond freely concerning them. The other directors thought it a suspicious circumstance, a breach of faith, if this correspondence concerned Santiago; a reason for the superintendent's removal if he was dividing his time with other enterprises, when the company thought they had the monopoly of his services. Still further investigations revealed that the seven hundred tons of rock which yielded the forty dollars a ton were not, as specifically ordered, taken from the whole exposed face of the mine, but picked from one rich spot, if not absolutely salted at the mills. The investigations are not yet ended, but the chief owners believe that they have been outrageously swindled.

"Meanwhile the assessments were thickening to pay thirty-five thousand dollars every sixty days, toward the mill purchase. Some of the heavier owners proposed to ease the burden of the lighter shareholders, and save their own credit, by buying the mill, at the cost to the company, for the use of another company in which they were interested. But this alarmed the small holders. 'A freeze out!' they exclaimed; 'None of that! We want the mill. We believe in the mine.' So, the heavy men, to keep the peace, and save their honor, vote to keep the mill, and the assessments go on. How they

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are borne may be guessed by the following advertisement which appears in a morning newspaper, and which we insert free, as a part of the story. Wilson's number of shares is set down as greater than is stated above. The explanation of that, however, is not difficult; it is small as here given:

"'SANTIAGO MINING COMPANY.
"'OFFICE: SAN FRANCISCO, November 2, 1863.

"'Notice is hereby given that, in accordance with the laws of the State of California, and pursuant to an order of the board of trustees of said company, there will be sold at public auction, at the salesroom of Jerome Rice & Co., No. 327 Montgomery street, San Francisco, on Saturday, the fifth day of December next, at twelve o'clock, noon, to the highest bidder, for cash, in United States gold coin, so many shares of the capital stock of the company standing in the names of the following shareholders as will be necessary for the payment of an assessment levied October 3, 1863, together with expenses of advertising and sale, to wit:

NAMES.	Shares.	Amount.
J. B. Bayerque.....	89	$890
J. D. Wilson.....	54	890

(*Here follow 27 other names with number of shares and amounts.*)

"'By order of the Board of Trustees.

"'EDWARD A. BREED, Secretary.'

"There may be some who, having no faith in mankind, will insist that this is a gigantic game of freeze out. Citizens generally will believe it to be one instance out of many that seldom come to light, where the shrewdest and most careful and honorable business men are led into operations whose results are more regretted by them on account of the mortification they must feel at seeing poor men ruined by being drawn into enterprises on the strength of their names, than for the thousands of dollars that are taken out of their own coffers and sunk. If that is the case, society is indebted to the capitalists in the 'Santiago' who allow the story to be told for the warning of a mining-mad community.

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"Every honest exposure of the operations of a mining company or its agents, helps to break up the schemes of swindlers, which are doing more than anything else to prevent the development of the resources of the mineral States. Let the honest men who are diddled, throughly sift the method of the deceit that makes them suffer, and with all the appliances of the law prosecute those who deceive them, and prospecting will be put on a firm basis, and California and the Territories adjacent will continue every year to astonish the world with the bounty of their newly developed treasures. Meanwhile, every citizen finds a lesson in the story of the Santiago. Whether it was only a mistake or something worse, it is clear that it is not safe for any man to invest his all in any one mining speculation, however promising it may be, nor though the ablest business men in the community believe in it. Let the prospecting go on, but let no man stake his all on the realization of any one prospect that is not absolutely in the line of his own business."

This action was commenced to recover damages for the libel.

The defendants in the answer set up, among other defenses, the truth of the alleged libel. They also averred in the answer, that at the time of, and before the publication, the matters therein contained were commonly reported and generally believed, and that they published the same believing it to be true, after careful inquiry, and without malice, and that it referred to transactions and conditions of a public or general corporation, of which the plaintiff was a trustee and member, and that he was referred to in that capacity only, and that the publication was made in the usual course of defendants' business as public journalists, without ill-will or intent to defame the plaintiff.

On the trial one McCulloch was called as a witness for defendants, and he testified that he was a chemist and had obtained a patent for a process for reducing silver ore; that Wilson had obtained the right to use it in 1861 in Nevada. The counsel for defendants then offered in evidence a pamphlet, published by McCulloch in 1862, in which he had spoken of the plaintiff, and accused him of having tried to induce the witness to make experiments with the process, and falsely represent it as a failure, so that the plaintiff might profit by a de-

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preciation in mining stocks caused thereby. The plaintiff's attorney objected, and the court ruled out the pamphlet. There was a daily paper published in San Francisco called the *Daily Morning Call.* On the 31st of October, 1863, the *Call* published an article in relation to the plaintiff's connection with the Santiago mine, reflecting severely upon him. The defendants' attorney offered this article in evidence, and the plaintiff's attorney objected, and the court ruled out the article. The jury found a verdict in favor of the plaintiff for seven thousand five hundred dollars, and the court rendered judgment for that amount. The defendants appealed from the judgment and from an order denying a new trial.

The other facts are stated in the opinion.

J. W. WINANS, for appellants.

The court erred in refusing to allow defendants to prove their assertion that "The investigations are not yet ended: but the chief owners believe that they have been outrageously swindled." The evidence was competent in justification. The charge complained of was a distinct part of the alleged libel, and divisible from the rest. It could, therefore, be separately justified: 2 Selwyn's Nisi Prius, 1053; *Mowbray* v. *Walton*, 2 Barn. & Ald. 673. Section thirteen of the Practice Act provides that "The defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances." But this doctrine of justification, by proving the truth of the charge, is sustained fully by the authorities: *Com.* v. *Snelling*, 15 Pick. 341; *Bisbey* v. *Shaw*, 12 N. Y. 72; *Stow* v. *Converse*, 4 Conn. 33; *Thrall* v. *Smiley*, 9 Cal. 536; *Vanwyck* v. *Guthrie*, 4 Duer. 274; *True* v. *Plumley*, 36 Maine, 466, 481; 1 Hilliard on Torts, 340; 1 Starkie on Slander, 233; *Steele* v. *Southwick*, 1 Am. Lead. Cases, notes, 116; Voorhees' New York Code, Sec. 165, and notes. Again, if the evidence of the truth of the charge that the chief owners believed themselves to be outrageously swindled, did not constitute a justification, it was clearly admissible in mitigation of damages; yet the court ruled

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it out on this ground also, although the point was expressly presented: 1 Maule & Selw. 284; *Earl of Leicester* v. *Walter*, 2 Campbell, 251; Anthon's Nisi Prius, notes, 38–40; *Gilman* v. *Lowell*, 8 Wend. 582; *Henson* v. *Veatch*, 1 Blf. 371; *Dewitt* v. *Greenfield*, 5 Ohio, 225; *Jenks* v. *Backhouse*, 1 Binney, 92; *Bailey* v. *Hyde*, 3 Conn. 466; *Bush* v. *Prosser*, 11 N. Y. 355; *Heaton* v. *Wright*, 10 How. Pr. 83. And in *Stanley* v. *Webb*, 21 Barb. 148, a case very similar in principle to that we are considering, the court say: "The rule of law allowed the defendant to prove anything, under the general issue, which does not tend to a justification, but which falls short of that." That was an action for libel, and the attention of this court is invoked to it as being strongly similar in its facts, as well as in its principles, to that under review: *Remington* v. *Congdon*, 2 Pick. 315; *Bisbey* v. *Shaw*, 12 N. Y. 72, 73; *Weed* v. *Bibbins*, 32 Barb. 321; *Mapes* v. *Weeks*, 4 Wend. 662; Starkie on Slander, Vol. 2, p. 95, note 2; *Root* v. *King*, 7 Cowen, 616, 617; *Chalmers* v. *Shackell*, 6 Carr. & P. 475; *Kennedy* v. *Gregory*, 1 Binney, 85. The alleged libel constitutes a privileged communication. Its publishers, the defendants, were not, therefore, liable without proof of express malice. For a clear statement of the doctrine of privileged communications we refer to the opinion of an eminent jurist, Judge Parker, of New Hampshire: *State* v. *Burnham*, 9 N. H. 41; *Bradley* v. *Heath*, 12 Pick. 165; *Perkins* v. *Mitchell*, 31 Barb. 467; *Kelly* v. *Tinling*, L. R. 1 Q. B. 699; *Gassett* v. *Gilbert*, 6 Gray, 97.

The words complained of are not libelous, *per se*, as (in themselves) they can not be said to import anything of a defamatory character concerning the plaintiff. They make no direct charge against him of any kind whatever. It follows that what the defendants intended and understood them to mean, and what they were understood by those to whom they were published to mean, must be a matter of averment and proof: *Gibson* v. *Williams*, 4 Wend. 320; *Andrews* v. *Woodmansee*, 15 Wend. 232; *Woolnoth* v. *Meadows*, 5 East. 463; *Dexter* v. *Taber*, 12 Johns. 239.

Evidence of previous publication in other newspapers or journals, containing the same charges, was admissible to disprove malice, and in mitigation of damages. The court erred

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in excluding the article in the *Daily Morning Call* and that in McCulloch's pamphlet: *Wyatt* v. *Gore*, 1 Holt's Nisi Prius, 299; *Romayne* v. *Duane*, 3 Wash. C. C. 246; *Morris* v. *Duane*, 1 Binney, 90; *Burns* v. *McCarkle*, 2 Browne, 80; *Wilson* v. *Apple*, 3 Ohio, 270.

In *Morris* v. *Barker*, 4 Harrington, 521, the court says it is reasonable "that although a man may not justify the uttering of a slander, nor attempt to prove its truth upon a plea of not guilty, yet, with a view to mitigate the damages and disprove malice, he might show that before the uttering of the slander by the defendant it was generally reported and spoken of by others." In the case of *Bailey* v. *Hyde*, 3 Conn. 463, the court thus declares: "Or if the fame of a person is disparaged by there having been reports in the neighborhood that he had been guilty of practices similar to those imputed to him, it is admissible." *Treat* v. *Browning*, 4 Conn. 408; *Earl of Leicester* v. *Walter*, 2 Camp. 257; *Wyatt* v. *Gore*, 1 Holt's N. P. 299.

WILSON and CRITTENDEN, for respondent.

The charge contained in the article was virtually one of swindling. The mere form of expression, "I *believe* he is a swindler," or "it is believed he is a swindler," does not alter the character of the libel. It would be remarkable if in actions of libel, in the above instances, a man could either justify or mitigate the wrong of such publications in a newspaper, by himself taking the stand and swearing that he did believe it, or calling Smith or others to swear that they believed it. Private character is afforded a weak protection if such is the law. A sure mode of contumely and degradation is presented, easy of infliction, easy of justification, and impossible of refutation. The *belief* of a man's enemy concerning his conduct and principles would at once furnish the sword with which to assault, and the shield to avoid punishment in return. The charge, though made under the form of the belief of other persons, is, in the eye of the law, a direct charge of swindling, and therefore the only proof admissible in justification would be proof of *the fact* of swindling, and not merely the *belief* of others: Heard on Libel, Sec. 176;

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Waters v. *Jones*, 3 Porter (Ala.) 448; *Logan* v. *Steele*, 1 Bibb. 593; *Brooks* v. *Bemiss*, 8 Johns. 455; *Root* v. *King*, 7 Cowen, 613; S. C. 4 Wend. 113; *Skinner* v. *Powers*, 1 Wend. 451; *Miller* v. *Miller*, 8 John. 74; *Stick* v. *Wisdome*, Cro. Eliz. 348; *Brown* v. *Lamberton*, 2 Binn. 34; *Nye* v. *Otis*, 8 Mass. 122; *Kennedy* v. *Gifford*, 19 Wend. 301; *Inman* v. *Foster*, 8 Wend. 603.

It is now the established rule that to publish a libel, giving the name of the author, is as actionable as if no author's name was mentioned. And the proof that the person named told the publisher of the fact published is not even admissible in mitigation of damages.

The very clear and able opinion of Kent, Ch. J., in *Dole* v. *Lyon*, 10 Johns. 449, *et seq.*, settles these questions on principle forever, and has remained the settled law of New York, and we believe of the United States, ever since.

Evidence that a defendant had been told by another what he uttered against the plaintiff, is as inadmissible in mitigation of damages as it is in justification, whether the author's name was given at the time of publication or not: *Mapes* v. *Weeks*, 4 Wend. 659; *Inman* v. *Foster*, 8 Id. 602; *Kennedy* v. *Gifford*, 19 Wend. 301; *Austin* v. *Hanchette*, 2 Root, 148; *Treat* v. *Browning*, 4 Conn. 408.

It is well settled that neither particular reports nor public reputation of the truth of the slander, nor of kindred charges against the plaintiff, are admissible: *Inman* v. *Foster*, 8 Wend. 608; *Kennedy* v. *Gifford*, 19 Id. 301; *Matson* v. *Buck*, 5 Cow. 499; *Root* v. *King*, 7. Id. 613; *Fry* v. *Bennett*, 3 Bosw. 201; *Sheckell* v. *Jackson*, 10 Cush. 25. This is not a privileged communication. A private person complains of a libel published in a newspaper concerning him as a man. The authorities cited are utterly inapplicable. Mining is said to be a matter of great public interest. True, but not more so than agriculture, or commerce, or transactions in city property. Is a newspaper privileged to charge a man with being a swindler in town lots, because the sale of town lots is now a matter of great public attention? *Littlejohn* v. *Greeley*, 13 Abb. Pr. R. 48, 49; *King* v. *Root*, 4 Wend. 122; *Sheckell* v. *Jackson*, 10 Cush. 26. In the libel in the *Bulletin*, no reference is made to the article in the *Call*. As was said in *Bond* v. *Kendall*, 36 Vt. 743, "it lacks the *salvo* which has charac-

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terized all the cases in which it has been permitted to show that the defendant was reporting what had been told him by another, viz., the giving the name of the author." Evidence that the defendant had been previously told of the slander by another, was rejected when offered in mitigation of damages in the following cases, also: *Mapes* v. *Weeks*, 4 Wend. 659; *Gilman* v. *Lowell*, 8 Id. 581; *Wolcott* v. *Hall*, 6 Mass. 514; *Clark* v. *Munsel*, 6 Metc. 389; *Anthony* v. *Stevens*, 1 Mo. 256; *Moberly* v. *Preston*, 8 Id. 462; *Thompson* v. *Bowers*, 1 Doug. (Mich.), 327; *Sheckell* v. *Jackson*, 10 Cush. 25; *Leister* v. *Smith*, 2 Root, 24; *Lewis* v. *Niles*, 1 Root, 346: *Jackson* v. *Stetson*, 15 Mass. 57; *Bond* v. *Kendall*, 36 Vt. 743; *Talbutt* v. *Clark*, 2 M. & Rob. 312.

Were the damages excessive or given under the influence of passion or prejudice? On this subject the code of civil practice in this State is very plain. It is not merely "excessive damages" which afford a sufficient ground of new trial, but they must be so excessive as to appear "to have been given under the influence of passion or prejudice." Prac. Act, Sec. 193, cl. 5.

The court below, in the broad discretion which it exercised in determining the motion for a new trial, did not see any evidence of this passion or prejudice: *Hall* v. *Bark* "*Emily Banning*," 33 Cal. 525.

By the Court, CROCKETT, J.

If the alleged libel was actionable *per se*, it was unnecessary to prove the colloquium in order to make out a *prima facie* case for the plaintiff. When a libel is not actionable on its face, but has a covert, libelous meaning, a colloquium is necessary to explain the subject-matter, and to bring to light the true interpretation of the libelous words. In such cases the colloquium must be proved. But in the present case the alleged libel is actionable on its face, and it was unnecessary to prove the colloquium. No unprejudiced person, of ordinary intelligence, can read the publication complained of, and avoid the conclusion that it imputes to the plaintiff grave offenses and dishonest practices, which, if established, would justly bring him into general contempt and disgrace. The motion for a nonsuit was therefore properly denied.

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The alleged libel contains a paragraph in these words: "The investigations are not yet ended, but the chief owners believe they have been outrageously swindled." The defendants offered to call the chief owners of the mine, to prove by them that at the date of the publication they believed they had been outrageously swindled. The court excluded this proof, but decided that defendants were entitled to prove all the facts and circumstances tending to show that the owners or any of them had been swindled, and all facts and circumstances tending to create such belief. The defendants excepted, and assign this ruling as error. They claim that the proof was admissible, both in justification of that portion of the alleged libel and in mitigation of damages. But it was clearly inadmissible for either purpose. It can not be denied, and the counsel for the defendants concedes to the fullest extent that it is well established, both on reason and authority, that if a libel assert the defamatory matter, not as a fact, but only on the belief of the author, or as a rumor or general suspicion, the libel can not be justified by proof that the author believed it to be true, or that there was such a rumor or general suspicion.

In order to justify a publication, purporting to be made on the belief of the author that the fact was true, the defendant must prove the truth of the fact, and not merely that he believed it to be true. If one publish of another that he believes he was guilty of murder or arson, it is no justification to prove that he did in good faith believe it; but to make good the justification he must prove that the plaintiff was, in fact, guilty of murder or arson. This is conceded on all sides to be the law; and it results necessarily that if the publication complained of here had asserted that the author of it believed the chief owners of the mine had been swindled, it would not have been a justification to prove that he did so believe. To justify the publication he must have proved that they had in fact been swindled. But how can it vary the principle which underlies this rule of law, that the charge is made, not as a matter of belief on the part of the author, but as the belief of other persons? If there be any difference in principle between the two propositions, more plausible reasons can be adduced why proof of the belief should be held to be a justification

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in the former case rather than in the latter. When the author publishes his own belief that a fact exists, he knows the sources of his information, and whether they are apparently reliable, and whether the conclusion drawn from the facts is reasonable. But these elements may all be lacking in respect to the belief of another. He may have had no plausible grounds whatever for the belief; and to permit a defamatory charge published as the belief of some other person, to be justified by proof that such person did believe the fact to be as stated, would subvert one of the most thoroughly well established rules of the law of libel, and break down one of the chief safeguards of private reputation. The proof which was offered and excluded was obviously inadmissible as a justification. Nor was it competent evidence in mitigation of damages. The "mitigating circumstances" which are permitted by section sixty-three of the code to be pleaded and proved, must be such as tend to rebut the presumption of malice, or to reduce its degree. All libels are conclusively presumed to be, in some degree, malicious; but there are different degrees and phases of malice; and some actionable defamatory publications (all of which the law deems to be malicious, except privileged communications), are in fact published without actual malice. It is eminently just, therefore, that the defendants, with a view to reduce the damages, should be allowed to rebut the presumption of malice by the proof of what the statute terms "mitigating circumstances;" that is to say, the circumstances under which the publication was made, and the real motives which induced it.

In this case the defendants were permitted to show the sources of their information as to the alleged facts, the circumstances under which the publication was made, and the real motives which led to it; and they did, in fact, prove by the witness, Nisbet, that Maynard, one of the chief owners of the mine, stated to the defendants, or one of them, that he and the other principal owners believed they had been swindled. They were further permitted to show that they believed this information to be perfectly reliable, and published the facts as related to them by Maynard, in the full belief that they were true, and not from any malice or ill will toward the plaintiff, but only as a matter of general pub-

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lic interest. Could it, in any possible view of the subject, have tended further to extenuate the publication, if it had been proved that the chief owners did, in fact, then believe they had been swindled? It can not, I think, be doubted that so far as the conduct and motives of the defendants are concerned, the actual belief of the owners that they had been swindled is a wholly immaterial circumstance. The defendants were informed, from an apparently reliable source, that they did so believe; and they acted in good faith on this information, believing it to be true. Would it render the conduct of the defendants either more or less reprehensible if it afterward appeared that the chief owners did or did not believe they had been swindled? In deciding on the conduct or motives of the defendants, the belief of the owners of the mine that they had been swindled was a false quantity. It in no respect touched the question at issue, to wit, the conduct and motives of the defendants in making the publication. If the defendants were credibly informed, from an apparently reliable source, that the owners did so believe, and if they acted on this information, believing it to be true, the extenuation was none the more complete from the fact that the owners did so believe, nor would have been any less complete if they had not so believed. The fact of their belief was wholly immaterial, and could have no effect, either the one way or the other, toward elucidating the conduct or motives of the defendants. The proof was, therefore, properly excluded.

Another point made by the defendants is that the publication was privileged, and that the defendants could not be held liable, except on the proof of express malice, of which, it is claimed, there was no evidence whatever. It is said to be privileged because it was published by public journalists, as a matter of general and peculiar public interest, and related to the conduct of the plaintiff in his capacity of trustee of a mining corporation. But this was a private, and not a public corporation. The plaintiff was in no sense a public officer, and was responsible only to the stockholders and creditors of the corporation for the fidelity of his conduct as a trustee. His office was no more a public office than that of a trustee of a private corporation to build a

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bridge or construct a wagon road. Officers of this character have never been deemed public officers in such sense as to render them amenable to criticism, as in case of persons filling public offices of trust and confidence, in the proper administration of which the whole community has an interest. In the latter class of officers public policy demands that their official conduct should be open to unrestricted criticism, in which no malice is implied by law; and express malice must be proved to render the author liable. No case has been cited, nor am I aware of any, which holds that the trustee of a private corporation is a public officer in the sense claimed by the defendants. Nor can a defamatory publication in a public journal be said to be privileged simply because it relates to a subject of public interest, and was published in good faith, without malice, and from laudable motives. No adjudicated case that I am aware of, has ever gone so far. But whilst such publications can not be deemed privileged, so as to require proof of express malice, the publisher, in order to rebut the presumption of malice, should be allowed the fullest opportunity to show the circumstances under which the publication was made, the sources of his information, and the motives which induced the publication. The public interest, and a due regard to the freedom of the press, demands that its conductors should not be mulcted in punitive damages for publications on subjects of public interest, made from laudable motives, after due inquiry as to the truth of the facts stated, and in the honest belief that they were true. On the other hand, if the rule were further relaxed, so that such publications in respect to private persons would be deemed privileged, thereby shifting the burden of proof from the defendant to the plaintiff, in respect to malice, there would be but little security for private character.

It is easy for the publisher to show the circumstances under which the publication was made, the sources of his information, and the motives for the publication, and thus to rebut the presumption of malice. But if the burden of proof was on the plaintiff, it would often, and perhaps generally, be very difficult, if not impossible, to prove express malice. I think the present rule, which allows to the publisher the fullest opportunity to rebut the presumption of malice, secures to him

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all the protection which is consistent with a due regard to the safety of private character.

There was no error in excluding from the jury the article from McCullough's pamphlet, or the publication in the *Morning Call.* The former had no reference whatever to the transactions referred to in the present case, and must be deemed libelous, inasmuch as the court had no means of determining its truth or falsity by a judicial investigation. A former distinct libel on the plaintiff by another person ought not, on any principle of reason or justice, to be held to be an extenuation of the second libel. If the rule were otherwise, the more frequently an innocent person was libeled, the less would be his chance for redress against each successive libeler; and the more flagrant his wrongs, the less remedy would the law afford him. It has often been decided that it is not admissible to prove in mitigation that prior and up to the time of the publication the plaintiff had been generally reported and suspected to have been guilty of the acts imputed to him in the libel. Some of the earlier cases hold such proof to be admissible: *Earl of Leicester* v. *Walter*, 2 Camp. 251; 1 Maule & Selw. 284; Anthon's Nisi Prius, 38–40, and notes; *Noble* v. *Fuller*, Peak's Add. Cases, 139. But the current of modern authorities is to the contrary: *Treat* v. *Browning*, 4 Conn. 415; *Jones* v. *Stevens*, 11 Price, 82; *Mills* v. *Spencer*, 1 Holt, 53; *Inman* v. *Foster*, 8 Wend. 606; *Saunders* v. *Mills*, 6 Bing. 215, 220; Hare and Wallace, Notes, 1 Am. Leading Cases, 201, *et seq.;* Townsend on Slander and Libel, 504, *et seq.*

These decisions proceed on the theory that public policy, the good order and repose of society, and a due regard for the protection of private character, demand that no one should be permitted to excuse or palliate the offense of defaming the reputation of another on so slight a ground as public rumor or general suspicion, which are often wholly unfounded, and the result either of malice or misapprehension. If the defendants had offered to prove, in mitigation, that the plaintiff was commonly reported and generally suspected to have been guilty of the acts imputed to him in the alleged libel, I think the proof would not have been admissible in mitigation of damages, under the rule established by the almost unbroken current of modern decisions.

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Assuming that the article in the *Morning Call* related to the same transactions referred to in the publication in the *Bulletin*, it must be deemed libelous, for the reasons already stated in respect to the article from McCullough's pamphlet; and it is not pretended that the publication in the *Bulletin* was founded in any degree on the information derived from the *Morning Call*, or any one connected with it. On the contrary, the defendant, Nisbet, testifies that he made an unsuccessful effort to obtain information from that source before the article in the *Bulletin* was written, and, failing to obtain it in that quarter, the publication was based on the information derived from Maynard, which was deemed entirely accurate and thoroughly reliable. The article in the *Call* performed no other office than to direct his attention to the subject, and to stimulate further inquiry. A general rumor on the street would have led to the same result, and proof of the rumor would have been as admissible in mitigation as the publication in the *Call*, which, as here presented, can be treated in no other or more favorable light than as a printed rumor; and, as already stated, proof of rumors or general suspicion is not admissible in mitigation of damages.

It is also assigned as error that the evidence did not justify a verdict for the plaintiff; but there was some evidence tending to support the plaintiff's case, and it was the province of the jury to weigh the testimony. We never disturb the verdict on the ground that it was not justified by the evidence, when there was a substantial conflict in the testimony, even though we may consider it to be greatly against the weight of evidence.

We are also urged to reverse the judgment on the ground that the damages are so grossly excessive as to raise a reasonable presumption that the verdict was rendered under the influence of passion or prejudice in the jury. After a careful examination of the evidence, it is impossible, I think, to resist the conclusion that the damages are for a larger sum than the facts justified.

There was no proof of special damage, and it was satisfactorily established that the publication was made after careful inquiry from an apparently reliable source as to the truth of the facts, and in the full belief that the publication was true.

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And there was not only no proof of express malice, but it was clearly shown that the defendants had no malice or ill-will toward the plaintiff, and made the publication in the usual course of their business as public journalists, believing the matter to be one of special interest to the public at that time. It was, therefore, not a case calling for punitive damages. Nevertheless, the law implies that every libelous publication causes some damage to the injured party, and it is the peculiar province of the jury to estimate the amount. The court will not interfere in such cases unless the amount awarded is so grossly excessive as to shock the moral sense, and raise a reasonable presumption that the jury was under the influence of passion or prejudice. In this case, whilst the sum awarded appears to be much larger than the facts demanded, the amount can not be said to be so grossly excessive as to be reasonably imputed only to passion or prejudice in the jury. In such cases there is no accurate standard by which to compute the injury, and the jury must, necessarily, be left to the exercise of a wide discretion, to be restricted by the court only when the sum awarded is so large that the verdict shocks the moral sense, and raises a presumption that it must have proceeded from passion or prejudice. As already stated, the verdict in this case is not so grossly excessive as to raise that presumption.

Judgment affirmed.

1. Defense to suit for salary brought by an agent, that he had circulated slanders injurious to his employers' business, struck out as irrelevant: *Bate* v. *Sierra Nevada Company*, 1 M. R. 345.

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[1] THE EARL OF HUNTINGTON AND THE LORD MOUNTJOY'S CASE.

(4 Leonard, 147; 1 And. 307; Moore, 174; Godbolt, case 24. Common Pleas, 25 Eliz.)

Incidents of license. Upon the construction of a deed of bargain and sale of a manor, wherein the grantee covenanted that the grantor might dig for ore, the covenant being preceded by the formula, *proviso semper*, it was *held:* That such covenant amounted to the grant of an estate. 2. That such estate or interest could not be parted or divided. 3. That if assigned to two or more, they must work for ore as one person, with the workmen employed together by the two or more owners. 4. That the license did not exclude the right of its maker to dig also. 5. That the *proviso*, being coupled with words of grant, did not create a condition.

It was agreed by the two lords chief justices upon conference had with the other justices in the case between the Earl of Huntington and the Lord Mountjoy, that where the Lord Mountjoy by deed indented and enrolled, bargained and sold the manor of Camford to Brown in fee, in which indenture a clause was *proviso semper*, and the said Brown covenants and grants *cum* and with them, the Lord Mountjoy, his heirs and assigns, that the said lord, his heirs and assigns, might dig for ore in the wastes of Camford; and also to dig turf there, to make alum and copperas, without any contradiction of Brown, his heirs and assigns—that now here is a new grant of an interest to dig to the said lord and his heirs in the lands aforesaid, and not a bare covenant. And it was holden, also, that the said lord could not divide the interest granted to him in form aforesaid, viz.: To grant to another to dig one part of the said waste, etc. But they were of opinion that Brown, his heirs and assigns, (notwithstanding the said grant to the said lord,) owners of the soil there, might dig there. It was further moved in this case, that the said lord had demised the said interest to one Laycott, who assigned it over to A and B, and if the said assignment to two were good or not was a further question; for if to two, so he might do to twenty, and so a sur-

[1] Commonly cited as *Lord Mountjoy's Case;* See *Grubb* v. *Bayard*, 9 M. R. 199.

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charge might be the tenant of the soil. And as to that the said justices were of opinion that the said assignment to two was good; but the two assignees ought not to work severally, but together, with one stock, and with such workmen as belonged to them two; and *note*, it was holden in this case that this word *proviso* being coupled with other words of covenant and grant did not create a condition, but should be of the same nature as other words of grant.

CHETHAM v. WILLIAMSON ET AL.

(4 East, 469; 1 Smith, 70. King's Bench, 1804.)

Right to mine reserved, is not an exclusive liberty. In a release by the mortgagor of lands to a third party (the mortgagee conveying at the same time so that the fee and the equity passed together), there was inserted a covenant by the purchaser that it should be lawful for the party of the first part, "his heirs and assigns, at all times, to enter upon the lands, to search and dig for coal, and to take and carry away the same to his and their own use." *Held*, that this was only a license, and passed no interest in the soil, such as to exclude the purchaser, and those claiming under him, from getting coal there; nor could it operate as an exception or reservation out of the grant, because the legal title was not in the grantor at the time.

In trover for so many horse loads of coals, a special verdict was found, stating in substance:

That one Richard Nettleton, being seized in fee, subject to an equity of redemption in one Edward Hyde, of certain lands and tenements in Haughton, in the parish of Manchester in the county of Lancaster, by an indenture of lease of the 28th of March, 6 W. & M., between the said R. Nettleton of the first part and D. Hobson of the second part, and by another indenture of release of the 29th of March between the same parties of the first and second part, and the said Edward Hyde of the third part, in consideration of 5*s.* paid by Hobson to Nettleton, and of £63 paid by Hobson to Hyde, Nettleton granted, released and confirmed to Hobson and his heirs the said premises, to have and to hold the same to Hobson and his

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heirs; and E. Hyde thereby released to Hobson and his heirs all his power, title and equity of redemption, and all his right, title, estate, etc., in the premises. The special verdict then set out the last mentioned indenture *verbatim*, which, after reciting that the same premises had been before conveyed in mortgage by Hyde to Nettleton and his heirs, witnessed that Nettleton, at the instance of Hyde and for the said consideration of £63 paid by Hobson to Hyde, granted, released and confirmed to Hobson the premises, etc., in Haughton, then in the tenure of Hobson, *habendum* to Hobson and his heirs, with all ways, liberties, easements, profits, etc., absolutely without any equity of redemption, and Hyde thereby released to Hobson and his heirs all his equity of redemption and all his right, title, interest, estate, claim and demand whatsoever, in the same premises. And Hobson covenanted and granted to Hyde and his heirs an annual rent of 19*s.* 4*d.* payable out of the premises, with a power of entering and distraining for the same in the case of non-payment at the time. And Hobson further covenanted and granted for himself, his heirs, etc., to Hyde and his heirs, etc., "that it shall and may be lawful to and for the said E. Hyde, his heirs, etc., at all times hereafter to enter into all or any part of the premises to search for and dig for coal or stone, or any other mine or mineral whatsoever, and the same to take, have and carry away to their own use; provided upon condition that it shall and may be lawful to and for the said D. Hobson, his heirs, etc., and the occupiers of the premises, to have and take by way of deduction and allowance, all or so much of the rent of 19*s.* and fourpence aforesaid as shall be reasonable for any hurt, damage or prejudice that shall be done to the premises by reason of digging for or carrying away of any mine or mines as aforesaid." And Hobson likewise covenanted with and granted to Hyde, his heirs, etc., to suffer and permit Hyde, his heirs, etc., or agents, to hunt, etc., upon the premises and take the game, etc. The special verdict then found the seizin of Hobson, by virtue of the indenture and the statute of uses, in the premises thereby meant to be conveyed to him. It then stated that the said E. Hyde in his lifetime was also seized in fee of other lands in Haughton, and that he conveyed the same in several parcels to other persons respectively by indenture and release, to which Hobson was

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also a party, made in the same form and containing the same exceptions, reservations, gifts, grants and covenants as were contained in the before mentioned indentures of lease and release to Hobson. And that afterward, on the first of January, 1777, all the estates, right, title, interest and property granted and conveyed to Hobson by the said indentures of lease and release, on the 28th and 29th of March, 6 W. & M., and also granted and conveyed to the said several other persons by indentures of lease and release, by divers means, descents and conveyances, became and were vested in George Hyde Clarke as tenant for life thereof without impeachment of waste, and that he is now seized thereof for his life without impeachment of waste. That, on the first of January, 1781, all the estate, right, title, interest, property, claim, demand and power of the said E. Hyde which was excepted, reserved, given, granted, or conveyed to him by the said indentures of lease and release, became and were by divers mesne assignments and conveyances vested in the plaintiff Chetham in fee, who is now entitled thereto in the same and in as ample and beneficial a manner as the said E. Hyde would have been if now living. That on the 1st of January, 1781, all the estate, right, title, interest, property, claim, demand, and power of the said E. Hyde which was excepted, reserved, given, granted, or conveyed to him by the said other conveyances to the said other persons repectively, became and were by divers mesne descents and conveyances, vested in the plaintiff in fee; and that he is now entitled thereto in the same and in as ample and beneficial a manner as the said E. Hyde would have been if now living. That upward of sixty years ago and also within sixty years, the persons respectively claiming under the said E. Hyde, by virtue of the exception, reservation, gift, grant or conveyance, to him, in the said indentures of lease and release above particularly mentioned, and their respective lessees or agents, have, from time to time, at their pleasure, dug and got coals for their own use under the premises mentioned in the said indentures of lease and release above particularly mentioned, and have from time to time paid, or allowed to the persons who were owners or tenants of the estate and interest conveyed to the said D. Hobson, as aforesaid, different sums of money, as compensations for the injury from time to time

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done to the land. The special verdict then set forth an agreement in writing made on the 4th of November, 1782, at Preston, between the plaintiff and one Fletcher, and signed by them (which Fletcher was then an agent of the said G. Hyde Clarke, for the management of his collieries in Haughton, worked by a water engine—G. H. Clarke then being resident in the island of Jamaica—and which Fletcher made the agreement on the behalf of G. H. Clarke, without any special authority for that purpose from G. H. Clarke, and without his, Fletcher's, having any knowledge of the said indentures of lease and release,) whereby it was agreed between the plaintiff and Fletcher as follows: 1st. Mr. Chetham agrees to sell all his coals in Haughton that lie above the level of or can be laid dry by Mr. Clarke's present water engine in Haughton, to Mr. Clarke of Hyde, except so much of his coal as is in a meadow in Haughton, called Jasper meadow, in the occupation of S. Hague; which coal in said meadow Mr. Chetham agrees to set to Mr. Arden, of Stockport, together with the liberty of sinking pits, etc., for the getting and vending the same. 2d. Mr. Clarke and Mr. Arden to begin with all convenient speed to prepare for getting said coal respectively, and work the said intended collieries in a regular and proper manner, so as to get said coal in its due course with their other coal in other lands adjoining, according to the usual method, etc. 3d. Mr. Clarke and Mr. Arden to render an account once in each month, if required, of all coal which shall have been gotten and sold by them respectively, and suffer Mr. Chetham to inspect the colliery books, etc., and once in every quarter of a year pay one penny for every horse load of coal so gotten and sold; and also to allow Mr. Chetham to take and carry away for the use of his own fire, two horse loads of coal from each of their coal pits weekly, etc. 4th. Mr. Chetham not at any time to do or suffer anything whereby the said collieries of Mr. Clarke or Mr. Arden may be injured, etc. And lastly Mr. Chetham agrees to execute a lease to Mr. Arden and Mr. Clarke as soon as leases and counterparts can be prepared agreeable to the above conditions. It is at the same time agreed that Mr. Chetham is to have the liberty of appointing one collier to be employed at each pit, and such collier to be payed the usual wages by Mr. Arden and Mr. Clarke, he doing the like work. That such part of the coals mentioned in

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the indentures of lease and release of the 28th and 29th of March, 6 W. & M., as lie above the level of, or could be laid dry by the water engine of the said G. H. Clarke in the agreement mentioned, are part of the coals comprised in the above agreement. That G. H. Clarke after the making such agreement assented to it, and by virtue thereof, from time to time, got the coal lying above the level of the said water engine, and he or his agents or lessees have regularly, from time to time hitherto, paid to the plaintiff one penny for every horse load of coal gotten under the said agreement. That the plaintiff, from time to time since the making of said agreement, appointed a collier, who has been employed at each pit by G. H. Clarke and been paid by him according to the agreement. That G. H. Clarke afterward, on the 22d of December, 1798, demised to the defendants the coal mines mentioned in the agreement, together with his other coal mines in Haughton, as tenants from year to year, who entered and were possessed of the same. It then stated that the defendants got the coals in question under the premises mentioned in the indentures of lease and release of the 28th and 29th of March, 6 W. & M., which coals were gotten by them under a level of the water engine of G. H. Clarke mentioned in the agreement, and that no part of the said coals could be laid dry by the said water engine, and that no part of the said coals were comprised in the said agreement. That notice was given by the plaintiff to the defendants not to get the coals so situated, and that the defendants, after such notices, got and converted the same to their own use, etc.

LITTLEDALE, for the plaintiff, after stating the question to be whether Edward Hyde, the releasor, had an exclusive right to the coal under the lands thereby conveyed, or only a concurrent right with Daniel Hobson, the releasee, from whom the defendant claimed, contended that the covenant whereby Hobson "covenanted and granted to Ed. Hyde, and his heirs, etc., that it should and might be lawful for E. H., his heirs, etc., at all times to enter into all or any part of the premises to dig for coal, etc., and carry it away," etc., which covenant was contained in the indenture whereby Nettleton, the mortgagee, at the instance of Edw. Hyde, conveyed the legal estate, and E. Hyde released his equity of redemption to Hobson,

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did amount to a reservation and exception of the coal in the grant to Hobson, the legal estate and inheritance of which remained in Ed. Hyde and those claiming under him: Shep. Touch. 77; Shep. Com. Assur. 303; Co. Lit. 47a, which latter (n. 7) notes *Drake* v. *Munday*, Cro. Car. 207, where there was a lease for years by indenture and the lessees covenanted to pay £5 a year, and held to be a reservation. (LORD ELLENBOROUGH, C. J.—Is there not a general rule which over-rides all these cases, namely, that the words of the deed shall inure according to the apparent intent of the parties, as by law it may—as in *Lord Mountjoy's Case*, Moore, 174, where a proviso, though usually taken as a word of condition or covenant, yet coupled with and explained by other words, was holden to operate as a word of grant? There is no magic in words.) Here then the intent was that Ed. Hyde should have the exclusive right to the coal—and *Lord Mountjoy's Case* is an authority for that construction—and there need be no authority to show that Ed. Hyde had a fee. *Lord Mountjoy's Case* is more fully reported in 1 And. 307, where it is stated that he, being seized of two parts of the manor of Sanford, by indenture enrolled, bargained and sold the same to J. and C. B, and to the heirs of J.; which indenture after several covenants, proceeded thus: "Provided always, and it is covenanted, granted, concluded and agreed between the said parties and the said J. and C. B., and their heirs covenant and grant to and with Lord Mountjoy, his heirs, etc., that it shall be lawful to and for the said Lord M., his heirs, etc., at all times hereafter, to have, take and dig in and upon the heath ground of the premises from time to time, sufficient ores, heath turves, etc., for the making of alum or copperas, and to build, etc., without let or interruption of the said J. and C. B., their heirs," etc. And the opinion of the judges, among other points, was, 1, that the two parts were sufficiently conveyed to the said J. and C. B., absolutely, without any condition; 2, that Lord M., by the assurance passed by him and J. and C. B., had sufficient interest and right in fee to dig such turves, ore, etc., as mentioned in the proviso. (LAWRENCE, J.—There Lord Mountjoy was seized of the legal estate at the time of the grant, which makes all the difference.) *Lord Mountjoy's Case* was only a liberty to dig ore, etc., for a particular purpose.

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Lord ELLENBOROUGH, C. J.—Even if E. Hyde had been seized of the legal estate, which he was not, yet the liberty reserved of digging for coals could not give him the exclusive right to them. No case can be named where one who has only a liberty of digging for coals in another's soil has an exclusive right to the coals, so as to enable him to maintain trover against the owner of the estate for coals raised by him. The case of Lord Mountjoy, as cited from Anderson, is decisive against the plaintiff; and still more as it is reported in Godbolt, 17, which is directly in point. Those who compared it to a grant of common *sans nombre* used that as the strongest instance to show that it could not be an exclusive right.

LAWRENCE, J.—The covenant in this case can not operate as an exception of reservation in favor of Ed. Hyde, who had no legal estate in him at the time, but only the equity of redemption. He was, in law, no more than a stranger to the estate, and could not except or reserve that which he had not before. The covenant, therefore, can only operate as a grant: but a grant will not pass the land itself without livery.

Judgment for the defendant.

PER CURIAM.

DOE, ON THE DEMISE OF HANLEY v. WOOD.

2 Barnwall & Alderson, 724. King's Bench, 1819.

[1] **Instrument construed as license not lease.** The owner of the fee granted to the plaintiff and his fellow adventurers "full liberty, license, power and authority, to dig, work, mine, and search for tin and tin ore, etc," within certain lands described; to raise, make merchantable and dispose of the ores, etc., with certain reservations out of "the premises granted," for the term of twenty-one years, upon fixed royalty. ***Held***, that the indenture amounted to a license and not to a lease.

[2] **A licensee may not maintain ejectment,** at least not for mines beyond the limits of his actual workings.

[1] *Ganter* v. *Atkinson*, 9 M. R. 13.

[2] *Harlow* v. *Lake Superior Co.*, 9 M. R. 47.

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[1] **Distinction between lease and license,** and the proper words to create each stated.

[2] **Where the operative words of grant in a deed are clear,** they are not to be controlled by inadvertent expressions indicating a contrary intendment in the less formal parts of the deed.

[3] **Grantor's own belief.** In the construction of a grant the question is not what the grantor supposed he had done, but what he really has done by his grant.

Re-entry presumed where right to re-enter exists. Where the licensee of mines (or lessee) discontinued working, and thereupon the owner let them to others and himself engaged in mining thereon: *Held,* that such acts, the right of re-entry existing, should be construed as the exercise thereof, and not as an independent trespass.

The special verdict set forth an indenture, dated March 1, 1806, whereby Thomas Carlyon, being seized in fee of the premises, granted unto John Amler Hanley, his partners, fellow adventurers, executors, administrators and assigns, free liberty, license, power and authority to dig, work, mine and search for tin, tin ore, etc., and all other metals and minerals whatsoever, throughout all that part of the lands of the said Thomas Carlyon commonly called Crinnis therein limited and described; and the tin, tin ore, etc., and other metals and minerals there found to raise and bring to grass, and there to stamp, spall, pick, dress, cleanse and make merchantable, and dispose of, to their own use, at their pleasure, subject to certain reservations; and within the limits of the set thereby granted to dig, and make such adits, shafts, etc., and to erect such sheds, engines and other buildings as they should from time to time think necessary or convenient, for the more effectual exercise of the liberties thereby granted; together with the use of all such water and watercourses arising or running within the limits of the set thereby granted as were not in grant to any other person at that time (except the pot-water belonging or running to the tenements of Crinnis and Merthen), with liberty to divert and turn such waters and watercourses, except as aforesaid, and to cut any channels for conveying the same over any part of the lands lying within the

[1] *Massot* v. *Moses,* 8 M. R. 607.

[2] *Griffin* v. *Fellows,* 8 M. R. 657; *Walker* v. *Tucker,* 8 M. R. 673.

[3] *Vice* v. *Anson,* 7 B. & C. 509, *Post* PARTNER.

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limits of the set, for the purpose of more effectually and beneficially exercising and enjoying the liberties thereby granted; except unto the said Thomas Carlyon, his heirs and assigns, and his and their workmen, etc., free liberty of driving any new adit from any adit driven, or thereafter to be driven, within the lands thereby granted, and of quietly entering into and driving such new adits through the same, or any part thereof, and of sinking any shaft therein necessary and proper for the driving of such adit, into any other lands of the said T. Carlyon, or into the lands of any other person at his and their pleasure; and also except unto the said T. Carlyon, his heirs and assigns, full liberty to convey any watercourse over the premises granted, or any part thereof, in such manner as he or they respectively should think meet for any purpose whatsoever, doing no injury to the workings of J. A. H., his partners, etc.; to have, hold, use, exercise and enjoy the said several liberties, licenses, etc., for the term of twenty-one years, fully to be complete and ended. The indenture contained covenants for the payment of an eighth share of all ore to T. Carlyon, and that J. A. H. and his partners would pay all rates and taxes, and would effectually work the premises and support the adits, etc.; and then contained a proviso, that in case of the neglect or failure in the performance of any of the covenants, it should be lawful for Thomas Carlyon, his heirs or assigns, upon the lands, or any part thereof, in the name of the whole to enter, and the same to have again, repossess and enjoy. The special verdict then stated that the surface of the lands was, during all the time, occupied by the said T. Carlyon and his tenants of the surface, and that the said J. A. H., soon after the execution of the indenture, dug for tin, etc., and that about the month of July, 1806, the said J. A.H. made an excavation or adit within the limits horizontally into the earth, from the sea shore, upon the level of the sea, about seven or eight fathoms, when it cut a vein containing a small quantity of copper ore, and that the said J. A. H. then worked on the course of this vein toward the west, and got a small quantity of copper, but none of the copper was sold, and no profit was made, nor were any dues rendered to the said T. Carlyon in respect thereof; and that J. A. H. afterward pointed out a spot within the limits where he intended

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to sink a shaft down to the adit, and four pins were sunk in the ground to mark out the spot, but no such shaft was ever made, nor any building erected, or any other work done by J. A. H. within the limits aforesaid; and that J. A. H. did occasionally work within the limits until about six weeks before he died, when, declaring that it was not worth while to work, and that he would not work any more in any of the excavations or adits, he directed the materials to be removed, and that all the timber that was there should be knocked away and carried off. In pursuance of which direction the timber was knocked away and entirely removed, excepting one piece of timber of very small value which the men refused to knock away, on account of the danger to themselves in doing so; and the sea filled up the entrance of the excavation or adit. It then stated the death of J. A. H. intestate, and the grant of letters of administration to Nevil Norway, one of his creditors, on which a stamp duty had been paid on the sum of £300 only, being considerably less than the value of the property sought to be recovered by the action. Nevil Norway having died, letters of administration *de bonis non* were granted on the 9th August, 1815, to George Hanley, the lessor of the plaintiff, the only child of J. A. H., which were stamped by the commissioners of his majesty's stamp duties with a stamp duty of £3,000, upon security given, and without payment of the duty under the statute. Neither J. A. H. nor his administrators or assigns were in any manner prevented, either by water or any other inevitable impediment, from working within the limits.

In October, 1809, no person having in the interval dug for any ore, one William Brown, on behalf of Joshua Rowe and other persons, entered into a negotiation with Thomas Carlyon, for a set to be made and granted by the said T. C. to the said J. Rowe and the other persons, authorizing them to dig for tin, etc., and all other metals and minerals, throughout part of the lands described in the former indenture; which set T. Carlyon, about 11th October, 1809, verbally agreed to make, and settled with W. Brown as to the amount of the dues to be reserved on such set. In the month of November, 1809, T. Carlyon and W. Brown met J. Rowe and one J. Kroger, on part of the land described in the former indenture, and T.

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Carlyon pointed out some of the boundaries of the set to be made to J. Rowe and the other persons, and wished them success in their undertaking; and shortly after this, the said J. Rowe dug for copper, copper ore, etc., within the limits of the verbal agreement. On the 10th day of July, 1810, T. Carlyon became jointly concerned and interested with Oliver Woodcock, John Carne, and various other persons, in the mining and searching for tin and tin ore in certain other lands, part whereof lay within the limits of the indenture of the 1st of March, 1806; and upon that occasion a memorandum of agreement was made and entered into by T. Carlyon and those persons under which the co-adventurers engaged therein, dug for tin and tin ore, etc., within the limits of the first indenture, and raised and got a small quantity of tin and tin ore therefrom, and rendered the dues payable in respect thereof, to T. Carlyon. On the 12th of January, 1811, another indenture was made, sealed with the seal of T. Carlyon, and by him delivered to J. Rowe, by which said last mentioned indenture it was, amongst other things, witnessed, that as well in consideration of the surrender of a certain grant or set bearing date the first day of March, 1806, made and granted by the said T. Carlyon to the said J. A. H., being the indenture of the 1st March, 1806, as in consideration of certain payments, the said T. Carlyon demised the premises in question to J. Rowe for twenty-one years. Upon the said T. Carlyon delivering this indenture, dated 12th January, 1811, to J. Rowe, the latter, who had previously got possession of the one bearing date 1st March, 1806, being the holder of a sixty-fourth share, as a fellow adventurer with J. A. H. under it, delivered up that indenture to T. Carlyon, but no surrender in writing was ever made or executed thereof to said T. Carlyon. The limits mentioned and described in this last indenture, dated January 12, 1811, were not co-extensive with the limits mentioned and described in the indenture dated March 1, 1806, and the works constructed by the said J. Rowe were at a distance from and did not communicate with any part of the works done by the said J. A. H., nor were in any manner connected therewith. After the making of the indenture, dated January 12, 1811, J. Rowe continued to dig for copper and copper ore, and other metals and minerals, within the

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limits specified, and dug and made a mine therein, and got quantities of copper and copper ore therefrom, and disposed of the same, and rendered the dues to T. Carlyon. And J. Rowe, for the purpose of more effectually prosecuting the works, erected a counting house, stables and other buildings within the limits. There never was any building within the same limits except those erected and built by J. Rowe, since the execution of the last indenture. The surface of the ground under which the workings of J. A. H. were made was waste land which was in possession of the said T. Carlyon, and since the execution of the indenture of the 12th January, 1811, the persons claiming under the same have, by the permission of T. Carlyon, got stone on the waste ground and used a road over it, and have paid money to T. Carlyon for the getting of such stone, and the use of the road. The special verdict then set out the entry of the lessor of the plaintiff, the demise, and the ouster. The case was argued at the sittings before last Easter term, at Sergeants' Inn, by

ADAM, for the lessor of the plaintiff.

WYLDE, *contra*.

ABBOTT, C. J., delivered the opinion of the court.

This case, which came before the court upon a special verdict, was lately argued at Sergeants' Inn, before my brothers Bayley, Holroyd and myself; my brother Best declining to attend, by reason of his having been formerly engaged as counsel in the cause.

Upon the argument, three principal questions were made; first, as to the sufficiency of the stamp upon the letters of administration under which the lessor of the plaintiff claimed; secondly, upon the legal effect and operation of the indenture of the first of March, 1806, viz.: Whether this indenture operated as a demise of the metals and minerals, so as to vest in the lessee a legal estate therein, during the term, upon the conditions mentioned in the deed, or only as a license to work, and get the metals and minerals that might be found within the limits described; and, supposing the indenture to operate as an

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actual demise of the metals and minerals, then thirdly: Whether the acts done by the grantor, and under his authority, amount to, and are to be considered as a re-entry under the proviso, so as to put an end to the term of years created by the deed.

Upon the question relating to the sufficiency of the stamp, our opinion was given at the time of the argument, and it is not necessary to say more on that subject. Upon the second question it was argued, on the part of the lessor of the plaintiff, that the indenture of the 1st of March, 1806, operated as an actual demise of the metals and minerals, and conveyed the legal estate in them, during the term, as a chattel real. This proposition is necessary to the maintenance of the present action, because, if the deed operated as a license only, then, admitting that a party claiming under such deed, and who should have actually opened and worked, and should be in the actual possession of a mine, might, if ousted of such possession, maintain an ejectment, yet such a right, supposing its existence (and upon the question of its existence it is not necessary for us to decide), would not sustain the present action, inasmuch as the defendant was not shown to be in possession of any mine worked under the deed in question, but only of other mines and parts of the metals and minerals lying at a distance from the workings of the grantee, and which workings had even been long abandoned by him. It is our opinion that this deed operates as a license only.

The doubt has arisen from the inaccuracy of some of its expressions, which seem to import that the grantor supposed himself to have done that by the granting part of the deed, which, it is insisted on by the defendant, the words of the granting part do not warrant. But this instrument, though inaccurate, is a regular formal deed, containing all the formal or orderly parts of a deed of conveyance enumerated by Lord Coke (in Co. Litt. 6a.), except the clause of warranty, viz. the parties between whom it is made of the one part and of the other part, a full description of the premises it purports to grant, with the exceptions or reservations thereout, the *habendum*, the *reddendum;* the covenants and proviso for re-entry, the *in cujus rei testimonium*, and the witnesses. One of the proper offices of the premises or granting part of a deed, as is there stated by Lord Coke, is "to comprehend the certainty of the tenements" to be conveyed.

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This indenture, in its granting part, does not purport to demise the land, or the metals or minerals therein comprised. The usual technical words of demising such matters are well known and usually adopted in a formal deed where the intent is to demise the land, or metals or minerals; but the purport of the granting part of this indenture is to grant, for the term therein mentioned, a liberty, license, power and authority to dig, work, mine and search for metals and minerals in and throughout the lands therein described, and to dispose of the ore, metals and minerals only that should within that term be there found, to the use of the grantee, his partners, etc.; and it gives also further powers for the more effectual exercise of the main liberty granted. Instead, therefore, of parting with, or granting, or demising all the several ores, metals, or minerals, that were then existing within the land, its words import a grant of such parts thereof only as should, upon the license and power given to search and get, be found within the described limits; which is nothing more than the grant of a license to search and get (irrevocable, indeed, on account of its carrying an interest), with a grant of such of the ore only as should be found and got, the grantor parting with no estate or interest in the rest. If so, the grantee had no estate or property in the land itself, or any particular portion thereof, or in any part of the ore, metals, or minerals, ungot therein; but he had a right of property only as to such part thereof, as, upon the liberties granted to him, should be dug and got. That is no more than a mere right to a personal chattel, when obtained in pursuance of incorporeal privileges granted for the purpose of obtaining it, being very different from a grant or demise of the mines, or metals, or minerals, in the land, and is such a right only as, under the circumstances stated in this case, is not sufficient to support the present action of ejectment. This, we think, is the effect and operation of the deed, considering it with reference to its granting part only; and we are fortified in this opinion by the construction given to similar words of grant in *Lord Mountjoy's Case*, Godb. 24; 1 And. 307, and 4 Leon. 147; and in *Chetham* v. *Williamson*, 4 East, 469; even if the liberty granted be to be considered a liberty to get, exclusive of the grantor; and *a fortiori*, if it be, as in those cases, to be considered as not exclusive; that, however, is a point which

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it is unnecessary for us now to decide. It was contended; that in order to make a demise, or to pass such an interest in the soil as will support an ejectment, formal words of demise need not be used; and that words importing an intent in the grantor to divest himself of the possession for a time and vest it in another, operate in law as a lease, whatever may be their form; and further, that words showing such intent appear in different parts of this deed. The words alluded to are such as these, viz., "The land hereby granted," "the ground and premises hereby granted," and "the land or ground hereby granted," which occur in some of the clauses and covenants of the deed, and among others, in the clause of re-entry, upon which particular reliance was placed. A proviso for re-entry is, in itself, not less applicable to a license to dig, work, mine, and search for metals and minerals, than to a demise of metals and minerals, because under such a license works may be effected and a corporal possession had, which it may be competent for the grantor to resume; so that the argument rests upon the particular expressions used in the deed, and not upon the nature or quality of the clauses or provisions in which they are used. These expressions may probably be attributed to want of care and caution in the preparation of the deed; but supposing them not to be attributable to inadvertency, or supposing that we should not be justified in so attributing them, still they can, in our opinion, have no further effect than to show that the grantor who used them supposed that the soil or minerals, and not a mere liberty or privilege, passed by his deed; and if the words used in the granting part of the deed were of doubtful import, and would bear the construction for which the lessor of the plaintiff contends, such doubtful words of grant, aided by the others, showing the intent, might be sufficient to pass the land or soil, or minerals themselves, and to support an action of ejectment. But whatever doubts these expressions may cast, yet we think they are not sufficient to vary the construction that must be given to the words of the granting part of this deed; as those words are, in themselves alone, plain, and not of doubtful import, and as the proper office of that part of the deed is to denote what the premises or things are that are granted, and is the place where the intent of the grantor, and what he has

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actually done in that respect, is more particularly to be looked for, recourse must be had to the proper and efficient part of the deed, to see whether he has actually granted what, it is urged, his expressions denote that he supposed that he had granted; for the question properly is not what he supposed he had done, but what he really has done by his grant. For these incorrect expressions, the precise import of which he might not accurately attend to, are not sufficient to constitute a grant, or to operate so as to extend the grant, by converting the things granted from incorporeal to corporeal, and from chattels personal when gotten, into a chattel real, previously to their being gotten, which must be the case, if we were to adopt the reasoning on behalf of the lessor of the plaintiff as to the effect and operation of the deed, and which would carry the rights of the grantee much further then the grant of a license or authority extends.

Upon the third question we are also of opinion in favor of the defendant, and think the acts mentioned in the special verdict as done by the grantor, and under his authority, amount to, and are to be considered as a re-entry under the proviso, so as to put an end to the term created by the deed. It is clear that the grantor had, under the proviso, a right to re-enter by reason of the grantee's breach of covenant in not effectually working when not prevented by water or other inevitable impediment. The acts done either by the grantor himself, or under his authority, on part of the lands within the above limits, either in consequence of his negotiation and agreement with W. Brown, or of his agreement with Oliver Woolcock and others, or of his indenture made to J. Rowe, amount in law, we think, to a re-entry, and to a determination of the above grant of the first of March, 1806. Those acts, if done by a stranger, or other person having no right or authority to enter, would be wrongful, and so they would be in the present case though done by the grantor, or under his authority, if the above grant can be considered to have operated as a demise either of the soil or of all the ore, metals and minerals within the described limits, unless those acts be deemed to be in law an entry by the grantor, and a remitter of him to his former estate by a determination of his grant; and the authorities show that those acts must be deemed to be in law such an en-

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try and remitter. In Plowden, 92, it appears that if a person having a right of entry has done any act so that the disseizee might have an action against him if he was a stranger, the law saith that rather than he shall be punished it shall be an entry and remitter to him. So in Co. Litt. 55, entry into land without the consent of the lessee, and cutting down a tree where the trees were not excepted out of the demise, are considered to be an implied ouster and a determination of the will, for that it would otherwise be a wrong in him; and a lessor's putting in his beasts, to use the common appendant, is also considered as a determination of the will. And in Co. Litt. 245 b. the mulier's coming upon the ground upon his own head, and cutting down a tree, and digging the soil, or taking any profit, are stated to be interruptions, for (the book says) "rather than the bastard shall punish him in an action of trespass, the act shall amount in law to an entry. So it is, if the mulier put any of his beasts into the ground, or command a stranger to put on his beasts, these do amount in law to an entry."

It was urged on the part of the lessor of the plaintiff, that the words of the deed of the 12th January, 1811, by which that deed is expressed to be made partly in consideration of the surrender of the grant of 1806, together with the fact of the actual receipt of the deed of that date by Mr. Carlyon, from Mr. Rowe, into whose hands it had come, showed that none of the acts done by the grantor, were, or were intended to be a re-entry under the proviso contained in the deed of 1806. But we think such an effect can not properly be given to those circumstances, and that they ought to be considered only as matters of caution intended to preclude the question which, unfortunately, has since been raised. If, therefore, the grant in question can be considered to have been a demise of the land, or of all the ores, metals, and minerals within the limits described, yet it was determined by the above acts done by the grantor, or under his authority, amounting in law to a re-entry; in which case the present action of ejectment can not be maintained. For these reasons, the judgment of the court must be for the defendant.

Judgment for the defendant.

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ARNOLD V. THE RICHMOND IRON WORKS.

(5 Cushing, 502. Supreme Court of Massachusetts, 1850.)

[1] **License a defense in tort.** The plaintiff, lessee for years of an ore bed, entered into an agreement under seal, to supply the defendant with specified iron ore annually, at a certain price, with a stipulation that if the plaintiff should at any time refuse, or not be able to dig or raise the ore at a fair price, the defendant should be at liberty to employ others to dig or raise it for him; the plaintiff having neglected to furnish ore, the defendant entered and dug the ore. *Held*, that an action on the case sounding in tort could not be maintained against the defendant; the plaintiff's real remedy, if any, not considered.

This was an action of trespass on the case, tried before FLETCHER, J., and by him reserved for the consideration of the whole court.

The writ was dated March 22, 1849, and contained two counts.

In the first count it was alleged that the defendants, on the 15th of April, 1843, and on divers other days, etc., entered upon certain premises situate in West Stockbridge and Richmond, called the Cone ore bed, to the exclusion of the plaintiff and the utter denial of his right to dig and carry away the iron ore from the premises, and that the defendants unlawfully dug and carried away all the iron ore on said premises, and disturbed and hindered the plaintiff in the enjoyment of his rights thereto.

The second count contained a statement of a like injury to the plaintiff's right to the iron ore in certain other premises situate in West Stockbridge, called the Lane ore bed.

The respective rights of the parties in the ore bed mentioned in the first count, depend upon the terms and conditions of an indenture of November 24, 1830, between Benjamin Cone, of the one part, and Eli Richmond and Isaac Nicholson of the other, and an indenture of March 3, 1831, between Samuel Gates and others, of the one part, and Richmond and Nicholson of the other.

By the first indenture, Cone demised to Richmond and Nich-

[1] *Kamphouse* v. *Gaffner*, 2 M. R. 258.

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olson a tract of land in West Stockbridge and Richmond for a term of one thousand years, "for the purpose of searching for, digging, raising, depositing thereon or carrying from thence all iron ore, or other metals or minerals, on or from said premises, with the full and perfect right, at all times, of the right of way, in the most convenient and proper place, for the purpose of digging, drawing, or carrying from thence all the ore or minerals that may be found thereon."

The lessees covenanted that they would weigh all the ore and keep a just account of the same, when taken from the premises, and pay the lessor fifty cents a ton for each and every ton when carried away.

The lessees also agreed that they would dig, or cause to be dug and taken, such quantities as should be suitable and proper, commencing without unreasonable delay; and that in case they should cease or neglect to improve the ore bed at any one time for the space of one year, then the lessor should have the right to repossess the premises, and improve the same for his own use and benefit.

By the second indenture, Richmond and Nicholson agreed with Gates and others to sell them all the ore which they might raise or dig on the premises above mentioned, upon the following terms and conditions, namely: that Gates and others should receive of Richmond and Nicholson four hundred tons annually, or more, if the parties should agree for a greater quantity, for which Gates and others should pay Richmond and Nicholson a duty of fifty cents a ton in addition to the fifty cents a ton which they had agreed to pay Cone; and that so long as Gates and others should receive from Nicholson and Richmond four hundred tons annually, they should not sell any ore from the premises to any other person whatever.

This covenant was subject to the exception that if Richmond and Nicholson should raise more ore on the premises than Gates and others should want to purchase in any year, they might sell the overplus to any other persons besides Gates and others; but Gates and others should receive one half of the advance or benefit which might arise on such overplus, over and above the duty to be paid to Cone, and to Richmond and Nicholson, and the expense of digging or raising it; and the other half of the overplus should go to Richmond and Nicholson.

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It was also agreed that if Gates and others should at any time decline taking or receiving the four hundred tons of ore annually, as above stipulated, then Richmond and Nicholson should have full liberty to sell the ore which they might raise on the premises to any other persons, subject to the condition above named, so long as Gates and others should refuse to receive it; but whenever they should be willing to receive the four hundred tons annually, the conditions restricting the sale should be in full force.

The parties further agreed that if Richmond and Nicholson, or either of them, should at any time refuse or not be able to raise or dig ore at a fair price, Gates and others should have liberty to employ other persons to dig or raise it for them.

The second indenture contained a further provision relative to the payment for the ore, not material to be stated in the present case.

The plaintiff had succeeded to the rights acquired by Richmond and Nicholson under these instruments, and the defendants to the rights of Gates and others.

The rights of the parties in the ore bed mentioned in the second count depend upon the terms and conditions of an indenture of the 25th of April, 1832, between David R. Walling and others, of the one part, and James M. Holley and others, of the other part.

By this instrument Walling and others demised a tract of land in West Stockbridge, to Holley and others, for the term of nine hundred and ninety-nine years, "for the purpose of searching for, digging, depositing thereon and carrying away, all iron ore or other metals or minerals from thence, that may be found on said premises, with the full and perfect right of way in the most convenient place or places, and also the full and perfect right of way, and the use of all streams of water or water privileges in all places, for the purpose of washing and cleaning any part or parts of said minerals, as well as to dig and to drain all the mines that may be found thereon." It was agreed that Holley and others, after the first year, which was to be experimental, should dig or cause to be dug the amount of three hundred tons, if the ore should be found to be good, for which they were to pay Walling and others at

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the rate of seventy-five cents a ton; that they should keep an exact account of all the ore dug and carried away from the premises, and make out and settle the same on the first of January in each year; that if Holley and others should choose they might dig as much more as they pleased, paying therefor at the rate of seventy-five cents a ton, and that if at any time they should neglect to improve the premises for more than one year at any one time, then Walling and others should have the right to dig ore themselves, until Holley and others should choose to recommence operations, in which case they should have the right to enter and improve the premises whenever they should choose.

The plaintiff has the rights of Walling and others, and the defendants those of Holley and others, under this indenture.

It was in evidence on the part of the plaintiff that the defendants had dug iron ore both on the Cone bed and the Lane bed in each year, commencing in 1843 and ending in 1848.

It was admitted for the purpose of the case, that the defendants had not paid the plaintiff or his grantors any duty for ore taken from either the Cone or the Lane ore bed since the 15th of April, 1843; that neither the plaintiff nor his grantors had ever made any claim or demand upon the defendants for any such payment from the 15th of April, 1843, to the time of bringing the action; that the plaintiff had never offered to dig ore in the Cone bed, or expressed to the defendants any desire to be so employed, and that his grantors had not dug any in the Cone bed, or sought to do so, since 1843; and that neither the plaintiff nor his grantors had ever remonstrated against or opposed the operations of the defendants in either of the ore beds.

The defendants contended, among other things, that whatever might be the plaintiff's right and title in the premises described in this writ, he was not entitled to maintain against the defendants an action sounding in tort; and the presiding judge being of opinion, upon the facts proved or admitted, that the action could not be maintained, the case was thereupon taken from the jury to be reported as above for the consideration of the whole court, who were to make such order in the case as they might think proper.

J. ROCKWELL and J. B. WOODRUFF, for the plaintiff.

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H. W. BISHOP and H. W. TAFT, for the defendants.

FLETCHER, J.

This action sounds wholly in tort, and to maintain it, the plaintiff must show that the defendants took and carried away the ore as set forth in the declaration, from one or both of the ore beds described in one or both of the counts, wrongfully, without right on the part of the defendants, and in violation of the rights of the plaintiff.

The first count alleges that the defendants, on the 15th day of April, 1843, entered upon certain premises situated in West Stockbridge and Richmond, called the Cone ore bed, to the exclusion of the plaintiff and the utter denial of his rights of digging and carrying away the iron ore from the premises, and unlawfully dug and carried away all the iron ore therein, and disturbed and hindered the plaintiff in the enjoyment of his rights.

Whether the plaintiff can recover upon this count must be determined by the provision in the second indenture, that if Richmond and Nicholson, or either of them, should at any time refuse or not be able to dig or raise ore at a fair price, Gates and others should have liberty to employ others to dig or raise it for them. The defendants have the rights of Gates and others. If the contingency has happened upon which Gates and others, by the above provision, would have had the right themselves to take the ore from this ore bed, then the defendants, in taking ore from the bed, have not entered wrongfully, without right, and in violation of the rights of the plaintiff, who has only the rights of Richmond and Nicholson, the other party to the indenture.

But the case expressly finds that the plaintiff had never offered to dig ore in the Cone bed, or expressed to the defendants any desire to be employed in such work, and that his grantors had not dug any ore in the bed, nor sought to do so, since 1843, and that neither the plaintiff nor his grantors had ever remonstrated against or opposed the operations of the defendants in either ore bed. Thus it appears that as far back as 1843, and ever since, Richmond and Nicholson and the plaintiff entirely ceased to dig the ore at any price whatever, but wholly abandoned the business.

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In this state of things the defendants themselves, by the express provision of the indenture, had the right to dig and carry away the ore; and in doing so they did not act wrongfully, without right, or in violation of the rights of the plaintiff. Neither the plaintiff nor his grantors ever remonstrated against or opposed the operations of the defendants in either ore bed. The first count in the declaration, therefore, charging the defendants as wrongdoers in taking ore from the Cone ore bed, is not supported.

In the second count the plaintiff charges the defendants substantially with the same injuries and wrongs as are set out in the first count, with respect to his rights in certain other premises situated in West Stockbridge, called the Lane ore bed.

In regard to this ore bed it appears that by an indenture bearing date the twenty-fifth day of April, in the year 1832, between Daniel R. Walling and others on the one part, and John M. Holley and others, on the other part, Walling and others leased to Holley and others the land containing the ore by metes and bounds, for nine hundred and ninety-nine years, for the purpose of digging and carrying away ore, for which Holley and others were to pay certain stipulated prices. The plaintiffs have the rights of Walling and others, under this indenture. The defendants have the rights of Holley and others, and have therefore in express terms the right to take and carry away the ore, and so can not be held chargeable as wrongdoers under the second count in the declaration. As has been before stated, neither the plaintiff nor his grantors have ever remonstrated against or opposed the operation of the defendants in either of the ore beds.

There is a provision in this indenture that if Holley and others shall neglect to improve the premises for more than one year at any one time, then the other party shall have the right to dig ore themselves, but no question arises under this provision of the indenture in the present case.

It is admitted in this case that the defendants have not paid to the plaintiff or his grantors any duty or tax upon the ore which they have taken from either ore bed since April 15, 1843. It is also admitted that neither the plaintiff nor his grantors have ever made any claim or demand upon the defendants for any such payments from the 15th of April, 1843, to the time of bringing this suit.

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What rightful claims the plaintiffs may have against the defendants for ore taken from either or both of these ore beds, or in what form such claims may properly be asserted and enforced, it is not necessary now to decide or consider.

The decision in the present case is, that this action sounding in tort can not be maintained, and that the plaintiff must be nonsuited.

GRUBB V. BAYARD.

(2 Wall., Jr., 81. Blanchard & Weeks' Leading Cases, 467. U. S. Circuit Court, Eastern District of Pennsylvania, 1851.)

[1] **License distinguished from grant.** Where one owning a large tract of land, grants, bargains and sells a part of it, and for himself, his heirs, executors and administrators covenants with the grantee, his heirs and assigns, that the grantee, his heirs and assigns, may dig, take and carry away *all iron ore to be found* within the ungranted portion of the tract, paying so much a ton—this is not a grant of the ore, but of the right or privilege to dig, take and carry away ore to be found; and no property accrues in the ore until the privilege has been exercised.

The right is without stint, but is not exclusive of the owner of the soil.

"All" construed. The use of the word "all" referring to the ore is not necessarily exclusive of the owner's right; it describes the extent of the grant—not its exclusiveness.

Indivisibility. Such license is indivisible, and an assignee of an undivided interest (though the holder of all but a small fraction) has nothing and can not maintain action against the owner of the soil, excluding him from exercising the license.

David Foree, by deed of indenture made in 1769, reciting his title to 302 acres of land, grants, bargains and sells 20 acres of it, which are described, to William Bennet, leaving 282 acres still his own property, in regard to which the indenture contained the following covenant: "And the aforesaid David, for himself, his heirs, *executors and administrators*, doth *covenant, promise, grant and agree* to and with the aforesaid William, his heirs and *assigns*, that he, the said William, his heirs and assigns, shall and may, from time to time, and all time hereafter, *dig, take and carry away all iron ore to be found within the bounds of the said David's tract of land,*

[1] *Fuhr* v. *Dean*, 6 M. R. 216.

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containing 282 acres, provided he, the said William, his heirs and assigns, pay unto the said David, his heirs or assigns, the sum of sixpence, Pennsylvania currency, per ton, for every ton taken from the premises of 282 acres aforesaid."

The deed was a technically and well drawn instrument, containing all the formal or orderly parts of a deed enumerated by Lord Coke, (Co. Litt. 6*a*) and the covenant above quoted followed after the *habendum* and *tenendum*. Bennet being dead, the plaintiff purchased the interests of ninety-*four* of ninety-*nine* of his representatives, and the defendant having become owner of the 282 acres reserved, and having taken away many thousand tons of iron ore, this action on the case was brought by the plaintiff against him. It was admitted that the ore taken by the defendant was found, mined and dug by himself or his servants; and it appeared that neither Bennet nor his heirs, nor the plaintiff, had ever had actual possession, use, occupation, or enjoyment of the right granted by the deed of 1769, nor been in any way hindered in the enjoyment of it *otherwise* than by defendant's taking ore in the manner just stated.

The declaration, which contained numerous counts, founded the plaintiff's right to recover on his being "lawfully possessed of a certain right and privilege to dig, take, and carry away iron ore to be found within the bounds of a certain tract of land *to the exclusion of the defendant*," or as being "lawfully possessed of a certain *exclusive* right or *several* privilege to dig, take and carry away iron ore to be found within the bounds of a certain tract of land;" and charged the defendant with unjustly hindering and preventing the plaintiff from digging, taking away the iron ore to be found within the bounds of the tract, and also wrongfully taking large quantities of ore from said tract, etc. All the counts asserted, in some form, a right which was *several or exclusive in the plaintiff;* none of them representing him as a tenant in common with others, and none of them alleging a "surcharge" by defendant. The plea was *not guilty;* there being no plea of any sort in *abatement* for the nonjoinder of the remaining representatives of Bennet, whose rights the plaintiff had not acquired.

Upon these facts, a verdict having been given for the de-

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fendant, the following questions came before the court on a motion for a new trial:

I. What was the nature of the right granted by Force to Bennet?

II. Was this right—whatever it was—exclusive? so making it unlawful for the owner of the land to dig in it for ore as well as the assignee of Bennet?

III. Was this right divisible, or susceptible of apportionment, so that the plaintiff, having but 94-99ths of it, could maintain this action?

The case was thoroughly argued by THOMAS SERGEANT and MALLERY, for the plaintiff, and by DALLAS and PENROSE, for the defendant.

In favor of a new trial. The meaning and effect of the words quoted from the deed have, in some degree, been settled by the Supreme Court of Pennsylvania in a case (*Grubb* v. *Guilford*, 4 Watts, 223, 246) where this same deed was under consideration, although the point here raised was not the one in that case. Judge Rogers there, speaking of this deed, said: "It is a grant of twenty acres of land in fee simple, and also *a grant of an incorporeal hereditament, for a distinct and different consideration, in the remaining part of the tract* of two hundred and eighty-two acres. *The right to raise ore is an incorporeal hereditament, granted for a valuable consideration*, and *is not*, as has been contended, a *license*, revocable at the will of the parties." The grant makes an estate in the land.

Then the grant is *exclusive*. Bennet, his heirs and assigns, may "dig, take and carry away *all iron* to be found" within the 282 acres. These words are essentially different from those in *Lord Mountjoy's Case*, which will be relied on by the other side. How can one man dig, take and carry away "*all iron*" —not which *he* may find—but which is "to *be* found" within a certain tract, consistently with the same right in another man to dig, take and carry all or any of it away? If one man grants to another a right to put in his cattle on a certain field to depasture the whole field, and eat up *all* the grass on it, could he himself afterward depasture the field with *his* cattle? and if

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not enough for the cattle of both parties, bring an action against the other for surcharging the common?

IV. The grant is susceptible of apportionment, or if not, whatever objection can be raised from the want of the 5-99ths not acquired, can be raised only by plea in abatement. The evidence shows that the plaintiff has 94-99ths; he holds in common with those who hold the remaining 5-99ths, and tenants in common may sue severally. Any objection to their doing so must be taken by abatement.

Against a new trial. The declaration asserts an exclusive right in an entire thing. The evidence shows a right to 94-99ths only, of the thing. But it is a thing which is not divisible. If it were divisible the same party might be harassed by infinite actions. It is not a question of pleading or parties, but one of title. The title laid varies from that proved. No title is proved.

II. The language is that of a personal covenant, not of a grant at all. It does not bind the grantor's heirs and *assigns*, but his heirs, *executors and administrators*. It is not in the granting part of the deed, but in the place where, as a covenant, it ought to be. The grant was complete; the *habendum and tenendum* had been declared, and this part follows both. It is a license to go on the soil, to dig and take away all the ore he can find, and it is nothing more. In *Doe* v. *Wood*, 2 B. & Ald. 724, 743, in the K. B., 1819, the owner of land granted for twenty-one years to A and "his partners, fellow adventurers, executors, administrators and assigns, *free liberty*, license, power and authority to dig, work, mine and search for tin, tin ore, etc., and all other metals and minerals whatsoever," within certain limits; and the same "there found" to raise and dispose of, subject to certain reservations; and within the limits to make such adits, shafts, etc., and to erect such sheds, engines and buildings as they should from time to time think necessary or convenient, together with the use of *all* such water and watercourses, within the limits, as were not already granted to others, etc., excepting to the grantor, his heirs and assigns, free liberty of driving any new adit from any adit driven or to be driven "*within the lands thereby granted*," and of entering into and driving such new adits through the same into any other lands of the grantor. The indenture con-

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tained a covenant for payment of an eighth share of the ore, and a proviso that on failure, the grantor, his heirs and assigns, might re-enter "*upon the lands*," to "have again, repossess and enjoy them." On ejectment brought by A, the grantee, the question arose whether the deed operated as a license only, or as an actual demise of the metals, and conveyed a legal estate in them during the term as a chattel real. Chief Justice Abbott relied much on the fact that the deed, though inaccurate, was a regular, formal deed. The granting part, whose office it is "to comprehend the certainty of the tenements to be conveyed," did not purpose to lease the lands, and though a subsequent part of the instrument spoke of the *lands* as granted, yet these being among "covenants," or "clauses," the expressions were to be attributed either "to want of care and caution in the preparation of the deed," or, if not, could "have no further effect than to show that the grantor, who used them, *supposed* that the soil or minerals, and not a mere liberty or privilege, passed by his deed." *Muskett* v. *Hill*, 5 Bing. New Cas. 694, 708, 712, decided in the C. P. after this case, will be cited to destroy its value; but in that case there was "an express proviso, in the original grant, that the licenses and authorities should be assignable by deed," a fact which the court speaks of as "not unworthy of observation."

III. The right in the grantee, whether license, privilege, or grant, is not exclusive of the owner of the soil. Being but a right to all the ore the grantee can find, dig and take away, it is consistent with the owner's right to such ore as he can find, dig and take away. It is like a common *sans nombre*. There is no allegation nor proof that the defendant has surcharged by digging *more* than he ought. Indeed, the right laid would be inconsistent with such allegation or proof. The declaration lays throughout an exclusive or several right.

IV. But this whole case has been settled by the English courts in the *Lord Mountjoy's Case*,[1] so long ago as the reign of Elizabeth. It is in all particulars our case, and being so, and not to be departed from without over turning what has been established law for near three centuries, we press it as conclusive. The case is well reported by Anderson (Anderson, 307), C. J., of the Common Pleas, one of the judges who

[1] 9 M. R. 175.

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decided it, and who quotes the words of the deed. It is reported also by Leonard (4 Leonard, 147), and by Lord Coke (Co. Litt. 164*b*), who was Lord Mountjoy's counsel; and in a book called Godbolt's Reports (Godb. 17, 18) there is a report of it by some one who seems to have been present at the decision. It is also reported by Moore (Moore, 174) as Coke stated it in the Exchequer soon after the decision. The case, therefore, is well vouched. It was in the 25th of Elizabeth, "the Augustan age of our old common law learning," and it was thoroughly considered. It first arose before the Privy Council, and was referred by them for a certificate of opinion to C. J. Anderson, and Judge, afterward Chief Baron, Peryam, who returned a certificate of opinion in writing, which we have in Anderson. They say that they "*divers times* conferred thereof, not only between ourselves, but with some other justices," who were C. J. Wray, of the K. B., Chief Baron Manwood, "*et autres*," including, as appears from Godbolt, the Lord Chancellor. On certain points referred by the Privy Council, they and the "others that conferred," were "very doubtful and can not agree." On others, they were of one opinion. Lord Coke thus reports the decision: "The Lord Mountjoy, seized of the mannor of Canford in fee, did, by deed indented and inrolled, bargaine and sell the same to Browne in fee, in which indenture this clause was contained: 'Provided always, and the said Browne did covenant and grant to and with the said Lord Mountjoy, his heires and assignes, that the Lord Mountjoy, his heires and assignes, might dig for ore in the lands (which were great wasts), parcell of the same mannor, and to dig turfe also for the making of allome. And in this case three poynts were resolved by all the judges. First—That this did amount to a grant of an interest and inheritance to the Lord Mountjoy to digge, etc. Secondly—That notwithstanding this grant, Browne, his heires and assignes, might dig also, and like to the case of common *sauns nombre*. Thirdly—That the Lord Mountjoy might assigne his whole interest to one, two or more; but then, if there be two or more, they could make no division of it, but work together with one stocke; neither could the Lord Mountjoy, etc., assigne his interest in any part of the wast to one or more, for that might worke a prejudice and a surcharge to the tenant

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of the land." Anderson, it is true, takes no notice in his certificate of the point of indivisibility, nor does he state it as a question referred from the council. But Godbolt and Leonard each confirm Lord Coke, by stating expressly that the court held that the Lord Mountjoy *could not divide the interest*, viz., "to grant to one to dig within a parcel of said waste." Anderson gives the words of the deed, which much resembles ours. Lord Mountjoy "did license and authorise Richard Leycole, for and during the term of thirty-one years next, to *search*, *open*, *dig*, *cast up* and *work* for ALL manner of mines, minerals, mettals, liquors and commodities whatsoever, *in any of the mines, minerals, and possessions whatsoever* of the said mannor," and *the same to convert to his use during the said term*, yielding therefor yearly to the Lord Mountjoy the full moiety or one half, etc.

Guilford v. *Grubb*, cited on the other side, is no adjudication on the point before us. That case decided that the right in the 282 acres is not appurtenant to the twenty acres conveyed, so as to pass by a sheriff's sale of the latter.

Reply. *Muskett* v. *Hill* destroys *Doe* v. *Wood.* In the former case the court say, that the indenture in *Doe* v. *Wood* does not differ substantially from the one before them. They yet declare that the latter operates not merely as a license, but as a grant; a doctrine in which they show that older cases confirm them: *Thomas* v. *Sorell*, Vaughn, 351; *Palmer's Case*, 6 Rep. 25; S. C. Croke Eliz. 819, under the name of *Bassett* v. *Maynard; Grantham* v. *Hawley*, Hobart, 132.

The indivisibility of the grant is supposed to be decided by the *Lord Mountjoy's Case.* Anderson is the only reporter who had, certainly, any personal knowledge of that case. He reports it particularly, but makes no mention of the point of *indivisibility.* His report shows that it did not arise at all. Leonard's Reports and the book called Godbolt were both published by the same person, one Hughes, and the reports of this case are probably copied one from the other; or probably, as appears in Godbolt, both from Coke himself, who was counsel of Lord Mountjoy. Coke does not *report* the case at all. He merely states it in commenting on Littleton, and many years after the judgment was given.

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In respect to the exclusiveness of the grant, the language of the deed in *Lord Mountjoy's Case* is essentially different from that here. "To dig, take, and carry away *all iron ore to be found*," is a different thing from to "search, open, dig, cast up and work for ALL *manner* of mines, etc., and the same to convert to his own use," etc. The first gives all ore of a certain kind; the second as much as he can find of all *manner* of ore.

KANE J.—Is there anything in the deed which asserts that Foree intended to do more than enter into the ordinary covenant that, so long as there was iron ore on the 282 acres, Bennet and his assigns might work it if they chose, on paying a certain price per ton? I find the legal and apt phraseology in which a lawyer might embody such a covenant, and nothing more. The indenture in the case of *Doe* v. *Wood*, quoted at the bar, seems to me to resemble the grant of an exclusive incorporeal hereditament much more than the covenant before us. It was contended in that case that it should be regarded as a lease, and there was much in the words that gave countenance to such an interpretation. Thus it was argued, that the "full and free liberty to dig all metals and minerals throughout the demised lands," was tantamount to a sole grant of all the minerals, since two individuals could not both have full liberty so to dig; that the exclusive right which was engaged for to the adits or shafts amounted to an exclusive right to the ore, for the ore could not be got out except by the adits; that the right to erect sheds, to make watercourses, and use all the water on the land, showed that an interest passed in the soil; that the limited powers which were reserved to the lessor pending the term of passing through the mines for the purpose of working other mines adjacent, and still more the right of re-entry, in case of breach, which was specially set out in the deed—all assume that while the term continued the grantee had an estate; and that this was supported by the language in many parts of the instrument, which spoke of the "land hereby granted," the "ground and premises hereby granted," the "land or ground hereby granted," etc. The court was of opinion that the indenture amounted only to a license to dig and work; and Chief Justice Abbott,

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while he admitted that formal words of demise were not necessary to pass such an interest in the soil as was claimed, added that, whatever doubts the expressions referred to might cast, they were not sufficient to vary the construction of the granting words, which of themselves were not of doubtful import, and that they could not operate to extend the grant, by converting the things granted from chattels personal, when gotten into a chattel real previously to their being gotten: p. 740, 1. The case in Bingham, which the plaintiff's counsel refer to as destroying the value of *Doe* v. *Wood*, was a case of mutual and well-guarded covenants, which not only authorized the licensees to raise ore, paying therefor a certain toll, but also bound them to do so with a prescribed degree of energy and effect, under penalty of a forfeiture—a circumstance of much importance in determining the intent of the parties; besides which, they must have contemplated the grant of an assignable interest, for they had covenanted that the license might be assigned by deed.

II. But regarding Foree's covenant as an operative grant, what is the right that the plaintiff could claim under it? He says that it is not a right of common, but a right that excludes the owner of the soil. I think he is wrong in this. I should rather call it a right of common, even though it excluded the owner of the soil; that is to say, so far as the policy of the law permits him to be excluded. Common is a right or privilege, says Sir Matthew Hale (Arb. Tit. Common), which *one* or more persons claim to take and use in the natural produce of another man's land. It may therefore be exclusive or rather sole; for the grant or the prescription or custom may be in favor of one man only. But it can never exclude the lord of the soil from his reasonable participation. In *Procter* v. *Mallorie*, 1 Rolle's Rep. 365, Coke, J., says: "Notwithstanding a grant of common *sans nombre*, the lord may common with the grantee; and, moreover, the grantee must use the common with a reasonable number." And the reporter adds: "This was agreed to by the Lord Chancellor." And in two cases in the Year Books, which I cite from Rolle's Abridgment (Title A, Com. Pl. 2, and Title I, Common *Sans Nombre*, Pl. 5) the same position is affirmed. The owner of

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the soil, it is there said, hath such an interest in the soil that though he grant a right of common *sans nombre* yet the grantee can not use the common with so many cattle that the owner can not have common enough for his own cattle. And Coke adds (Co. Litt. 122*a*), that "a custom or prescription totally to exclude the owner of the soil is unreasonable and void as against law, because it was implied in the first grant that the owner of the soil should have common also." One of the points agreed in the case of the Lord Mountjoy was based upon this doctrine, where it is said that notwithstanding the grant of the right to dig, etc., to the Lord Mountjoy, the grantor, his heirs and assigns, owners of the soil, might dig there also: "like to the case of common *sans nombre*." And the same is relied upon as undoubted law by Lord Ellenborough in *Chetham* v. *Williamson*, 4 East, 469. In truth, the only exception to its application that I have found contended for in the books, is in the case of a free fishery mooted in a case in Salkeld (p. 637, *Smith* v. *Kemp*,) and discussed in Mr. Hargrave's note on Coke's Littleton, 122.

III. But would such a hereditament as the plaintiff claims to have be susceptible of apportionment? He claims that it is a right in gross. I have given my reason already for regarding it as a right in common. A right of common in gross *sans nombre*. Can such a right be apportioned?

The leading case upon this question is that of the Lord Mountjoy stated in the argument of the counsel and just now referred to by me. This case throughout bears on the question before us. It denies that the grantee of a right to mine can either assign his right to a third person for a part of the tract, or so assign an undivided interest in his right for the whole tract as to confer on the assignee a several right to mine; and by the reason which it gives for a continuing right to mine, in the grantor, notwithstanding his grant to another, it shows that the case would not differ, whether the original mining grant were or were not in its terms exclusive, for it refers to the analogy of a common *sans nombre*, in which, as we have seen, the owner of the soil can not be excluded, but may complain that he is surcharged, even against his own grantee of common unlimited. In other words, the case decides that a right in gross to mine, whether in terms exclusive or not, is

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essentially integral and not susceptible of apportionment. And this may be the meaning of Treby, C. J., where he says: (*Weekly* v. *Wildman*, 1 Ld. Raymond, 407), "although a common *sans nombre* may be granted at this day, yet such grantee can not grant it over." And a similar explanation may, perhaps, reconcile the opinion expressed in Sheppard's Touchstone, p. 238, to the same effect with the remark of Treby, and the case in the Year Book, 18 Edw. IV, 84, which the annotators cite as in opposition to their text. The incorporeal hereditament may well be assignable, and yet not apportionable. The assignment may have legal effect, but if it be to more than one, the assignees take together an indivisible entirety. Such I apprehend to be clearly the law laid down in *Lord Mountjoy's Case*, and I have no reason to suppose that the law of England is different at this day. To the same effect is *Leyman* v. *Abeel*, in New York (16 John. 30), the points decided in which are well condensed in the syllabus. "The grantee in fee of a right of common, in gross and without number, may alien it, and it descends to his heirs; but it can not be aliened in such a way as to give the entire right to several persons, to be enjoyed by each separately; and where it descends to several persons as tenants in common or parceners, it seems that it can not be divided between them, but that there must be a joint enjoyment of it; nor can one of the tenants alone convey a right in the common, but they may jointly alien their rights." The same principle is carried out in *Van Rensselaer* v. *Radcliff*, 10 Wend. 639, where Chief Justice Savage decides that "common of estovers, if divided by the act of the party, is extinguished; if by descent cast, must be exercised by the heirs jointly." The extinguishment of the right by an assignment of it in part is, I suppose, deduced from this consideration, that the right being essentially an entire one, and the whole neither passing to the assignee nor continuing in the assignor, it remains no longer in any one.

And all this is in harmony with the ancient law of qualified and incorporeal hereditaments. Thus, a condition may not be apportioned, but is determined by license as to part: *Dumpor's Case*, 4 Rep. 119*b*; S. C. 1 Smith's Lead. Cas. 15. And a right of way in gross doth not pass to several by assignment; and though a rent charge may be apportioned, as by an appor-

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tionment of the soil, in respect to which it is reserved, or so far, at least, that parceners may take it (Co. Litt. 164*a*, 165*b*), or a rent service, for it is to the advantage of the lord (*Doe* v. *Meyler*, 2 Maule & Selw. 276), as parceners may also take a corody certain or an advowson or a right of mill certain; yet this is only where the division of the inheritance would not prejudice another; for in the case of estovers or corody uncertain or piscary or turbary *sans nombre*, there can be no apportionment; and the reason why parceners take in such case at all, seems to be that they make but one heir in law, and therefore they must join in actions real, and if disseized, in one assize (Co. Litt. 164*a*); as they must also join (and so must tenants in common, *qua* parceners under our American statutes of descent) when damages are to be recovered for a *tort* done to their lands: *Daniels* v. *Daniels*, 7 Mass. 137.

I take, then, the law to be that if an incorporeal hereditament passed by the words of Foree's covenant to Bennet, it was one not susceptible of apportionment; that it passed by his death to his heirs jointly, and can only be enjoyed by them jointly, and as one tenant; that the assignees of the heirs stand in no better plight than the heirs themselves, and can have no separate enjoyment of the mining right, and that neither heirs nor assigns, nor both, can claim to exclude the heirs and assigns of Foree, owners of the soil, from a right to dig ore in common with them.

3. There remains the third inquiry: Can this suit be maintained, on proof of an apportioned interest, the defendant not having pleaded an abatement?

The plaintiff claims, not as a tenant in common with others, but as the exclusive owner of a several right; and he can not now turn around, and, asserting a tenancy in common instead, exclude the defense from showing that he does not legally represent the interests which, on this amended view of his title, should have united in the institution of the suit. The right which he asserted was an exclusive one in himself, according to some of the counts, and one that excluded the defendant, according to the others. And in one form or the other it was the basis of his suit. The case fails unless his proofs support this exclusiveness of claim.

GRIER, J.—Assuming, for the argument, the plaintiff to be

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the assignee of the whole right which was vested in Bennet, and that it is a *grant* upon sufficient consideration, let us inquire, what is granted? Not the iron ore. This the plaintiff properly admits in his declaration, where he defines his interest under the deed as a "*right* and *privilege* to dig, take and carry away *iron ore to be found*" in the land of defendant. If it had been a grant of an absolute property in all the iron ore in the tract, the deed would have been insufficient to confer title without livery of seizin, and the Statute of Limitations a bar to the claim. A right or privilege to dig and carry ore from the land of another is an incorporeal hereditament—a right to be exercised on the land of another. It is a license irrevocable, when granted on sufficient consideration. It may be demised for years, or granted in fee; it is assignable. The grantee or assignee of such a license, right or privilege, to be exercised on the land of another, has no such title to the ore that he can support trover against the owner of the land for ore or coal raised by him: *Chetham* v. *Williamson*, 4 East, 476. On this subject I may adopt the words of Lord Tenterden, in one of the cases, relating to mines, quoted at the bar—*Doe* v. *Wood*, 2 B. & Ald., 724, 738: "This indenture in its granting part does not purport to demise the land or the metals or the minerals therein comprised. The usual technical words of demising such matters are well known, and usually adopted in a formal deed, when the intent is to demise the land, or metals, or minerals. But the purport of the granting part of this indenture is to grant, for the term therein mentioned (here in fee), a liberty, license, power and authority to dig, work, mine, and search for metals and minerals, in and throughout the lands described, and to dispose of the ore, etc., *that should be found within the term*, to the use of the grantee, etc. Instead, therefore, of parting with or granting all the ore that was then existing on the land, its words import a grant of such parts thereof as should, upon the license or power given to search and get, be found within the described limits; which is nothing more than a grant of a license to search and get (irrevocable, indeed, on account of its carrying an interest), with a grant of such of the ore only as should be found and got, the grantor parting with no estate or interest in the rest.

2. Is the right granted one that is exclusive of the owner

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of the soil? Much stress has been laid upon the word *all* in this grant as having the effect of making it exclusive. But so important a restriction can not be deduced from so equivocal an expression. The deed has been drawn by a very able conveyancer. He seems to have had Lord Mountjoy's Case in his mind at the time. He employs none of the apt and well known terms or phraseology to indicate an intention of giving an exclusive right as against the grantor himself. The grant of a right to dig, take and carry away "*all*" iron ore to be found within the bounds, etc., shows the extent of the license, but not its exclusiveness. The grantee may dig, take, etc., of *any* or *all* the ore he can find on the land, but he has no exclusive right in *any* of it till he *finds it* and *digs it*. It is a right without stint as to quantity, and Lord Mountjoy's Case likens it to the grant of a right of common *sans nombre*, which does not exclude the owner. This is a point decided in Lord Mountjoy's Case, as reported by Coke, Leonard, and Godbolt.

3. Did the evidences given by the plaintiff support the allegation that he was possessed of the *exclusive* right to dig, etc., assuming that the deed in question conferred an exclusive right on Bennet to dig, take, and carry away the iron ore on this tract of land? The right, license, or liberty granted to Bennet is in its nature one and indivisible. Unless the plaintiff is clothed with the *whole*, he has *nothing*. As of other things indivisible, it may be held by one or more as joint tenants. But they hold *per my et per tout* (not as Blackstone has erroneously interpreted it, "by the half or moiety and by all"), but "by *nothing* and by *all*" (7 Man. Gran. & Scott, 452, in note), or, in the language of Bracton, "*Quilibit totum habet & nihil habet, scilicet totum in communi et nihil separatim per se.*" As a right to be exercised in the land of another, it is an indivisible unit. Whether the plaintiff has 1-99th, or 94-99ths, makes no difference. If he has not the whole, he has nothing. It is a question of title, and not of pleading. The case of Lord Mountjoy is conclusive on this point also.

New trial refused.

On a subsequent day, the following opinion, *totius curiæ*, signed by both judges, was pronounced by GRIER, J.

As the opinions heretofore delivered by the respective

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members of this court, on the questions argued on the motion for a new trial, may possibly be construed as arriving at the same result by a different course of reasoning, and may be considered as deciding the present motion *only*, without any definite opinion of the whole court, as to the nature or construction of the covenant in the deed of 1769, we state the following propositions as ruled by the *whole court*, in which we agree, without repeating the authorities, or all the reasons which might be urged in support of them, and for which we refer to our several opinions as delivered.

1st. For the purposes of the present decision, we *assume* that the covenant in question contains a *grant in fee* to Bennet and his heirs, for a sufficient consideration *to be paid.*

2d. We decide, that the thing granted is *not* the iron ore contained in the land of defendant, but an incorporeal hereditament—a right, or license, or liberty, well described in the plaintiff's declaration as "a right and privilege to dig, take, and carry away" *all* or *any* iron *ore to be found* in the land of defendant. It is a license irrevocable, which may be demised for a term of years, or assigned in fee.

3d. That until the grantee or his assigns exercised this privilege by *digging*, *taking*, etc., *iron* ore *found* in the land, they had no property *in* the ore that would support an action of rover for the same.

4th. That the effect of the word "*all*" in this grant is not to give an exclusive right *as against the grantor.* It describes the *extent* to which the license may be exercised, not its *exclusiveness.* It is a grant of a right to take ore without stint, and is aptly compared to a right of common in gross *sans nombre*, which does not exclude the lord or owner of the land out of which it is granted.

5th. That such a right is *indivisible*, and unless the plaintiff, as assignee, is clothed with the *whole*, he has *nothing*, and can not support this suit as against the owner of the land.

6th. And lastly: That the case of the Lord Mountjoy, as reported by several authoritative reporters, and, among them, by Lord Coke in his Commentary, is directly in point on both parts of the case, and rules it. Its authority has never been questioned, and the application of its doctrines to this case results in a conclusion which accords with our reason, and our sense of justice.

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BUSH v. SULLIVAN ET AL.

(3 G. Greene, 344. Supreme Court of Iowa, 1851.)

[1] **License revocable only after compensation or notice—[1] Statute of Frauds.** Under a parol license to mine upon a royalty where the occupant has entered and made expenditures, the license can not be revoked without compensation, or giving the party the six months' notice to quit, to which a tenant at will is entitled; and although such license is within the Statute of Frauds, still, when connected with the matter of improvements, it is voidable only after such compensation or notice.

Error to Dubuque District Court.

Action of ejectment by J. D. Bush against M. J. and J. M. Sullivan. Plea, general issue. Verdict and judgment for defendant.

L. A. THOMAS, for plaintiff in error.

P. & J. M. SMITH, for defendant.

Opinion by GREENE, J.

We learn from the facts recited in the bill of exceptions, that defendants had been in possession of plaintiff's mineral land, by virtue of an unlimited parol license, for about two years; that they had made large expenditures in proving the ground; that under the arrangement, plaintiff was to have one fourth of the mineral raised by the defendants, as his ground rent, and that he had already received proceeds of his fourth of 8,240 lbs. It also appears that defendant owned lands adjoining the *locus in quo;* that one of the objects in sinking shafts and running drifts was to get upon and prove their own land, and that in February, 1850, the parties met and agreed upon the terms of a written lease to the mining interest; that a lease was signed by the parties, but not delivered; that

[1] Compare *Beatty* v. *Gregory*, 9 M. R., 234 and *Anderson* v. *Simpson*, 9 M. R. 262.

[2] *Jenkins* v. *Lykes*, 19 Fla. 148; 45 Am. R. 19.

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plaintiff then read a lease which he wanted defendants to sign, by which they were to furnish him certain pasture ground, at $1 a year, but defendants object to give the pasture privilege for more than one year, therefore plaintiff declined delivering the lease which he had signed, and forbade defendants from going on or mining upon the ground from that time forth; but they continued mining on the ground from that time till in August, with the knowledge, but without further objection from plaintiff. Upon these facts the court instructed the jury, that plaintiff forbidding defendants further working or mining the ground at the time they attempted to execute a written lease, was not sufficient notice to quit.

Although defendants were in possession under parol permission only, still, as that possession was authorized by the owner of the soil, and as under that license they had been induced to make expensive improvements, it would be repugnant to the leading objects of the law to recognize a notice that would give neither remuneration for the improvements, nor time to make them available.

True, a parol lease like the present is at least voidable under our Statute of Frauds, and at all times revocable by the owner of the land; still there are principles of law and common honesty that should be observed in such revocation. Where these parol arrangements to work mineral lands on shares are of such common occurrence, and when a Statute of Frauds renders them so inoperative, it becomes highly important that some principles should be recognized by the courts under which gross injustice may be avoided.

If a miner has been induced, under parol license, to sink a shaft or run drifts, and if before proving the ground the license is revoked, he should have either the six months' notice recognized at common law to a tenant at will, or else the amount expended by him on the ground should be refunded. These well known principles should no doubt be recognized in cases like the present. In England it has been held that a parol license to work and improve lands, where an expense has been incurred, can not be revoked without repaying the expenses: 8 East, 308, note 1. This important principle may well be recognized in a parol license like the present, which comes within the Statute of Frauds. Before declaring such an agree-

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ment void under the statute, a court should apply every appropriate principle of law to bring the parties *in statu quo*. And hence we assume that the license in the present case was not absolutely void, as claimed by counsel, under the third section of the Statute of Frauds; it is only voidable. Not *ipso facto* void, but may be declared void by a competent tribunal on terms calculated to prevent fraud. If the owner of the soil desires to revoke such parol license, he should refund the expenses incurred in improvements, or give such reasonable notice as would enable the occupant to secure the products contemplated for his labor and improvements.

The doctrine is well settled that a parol tenancy for farming purposes is to be considered a tenancy at will from year to year, and that six months' notice to quit is necessary. The reason for this principle is, that the tenant should have time to reap the crop which he had planted. Upon the same principle, a parol license to sink shafts and run drifts for a share of the mineral found and raised, there is the same reason and necessity for the rule that the miner shall have like notice to enable him to prove the range and raise the mineral which his money and industry have developed. In such a case, at least six months' notice should be given, or compensation for the improvement should be made.

We see nothing in Bainbridge on Mines, or in any other authority cited, that militates against this principle. We conclude, therefore, that the court below correctly charged that the notice to quit was not sufficient.

Judgment affirmed.

BRANDT v. MCKEEVER.

(18 Pennsylvania State, 70. Supreme Court, 1851.)

State patent on river bed. A warrant under the act of 1848, and a survey thereon of the bottom of the Monongahela river, passes not the title *to the soil*, but the right "to dig and mine for iron, coal, limestone, sand, gravel and fire clay." The warrantee does not acquire the right to the sand deposited on the bed of the river by the current; the right to that remains in the commonwealth. The patent granted only the right to dig and mine under the bed of the river.

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Error to the Common Pleas of Allegheny County; Jacob F. Brandt, plaintiff in error, v. Alexander McKeever. Jacob F. Brandt instituted before an alderman an action of trespass v. Alexander McKeever, for taking sand and gravel from a certain portion of the bed of the Monongahela river, which had been and was at that time embraced within his survey of 100 acres, made on a warrant dated 24th April, 1848, under the act 11th April, 1848. See Pamphlet Laws of 1848, p. 533.

The justice having entered judgment against the plaintiff for costs, an appeal was taken to the Court of Common Pleas No. 63, October term, 1848. The following case was stated for the opinion of the court, viz.: Plaintiff got a warrant and survey under the act of 11th April, 1848, to encourage the further development of the mineral resources of the Commonwealth of Pennsylvania; defendant afterward took $10 worth of sand from the bed of the river Monongahela, within the bounds of plaintiff's survey, whereupon plaintiff brought this action for damages. If the court are of opinion that plaintiff, under the warrant and survey, was entitled to the sand within his survey on the bottom of the river, it is agreed that judgment shall be entered for plaintiff for $10. If the court think plaintiff not entitled, then judgment to be entered for defendant, with liberty to either party to take a writ of error.

See act of 11th April, 1848, in Pamphlet Laws, 533. The act of 24th March, 1849, acts of 1849, p. 225, declares that the act 11th April, 1848, shall not be construed to grant any right or privilege whatsoever to the surface of the bed of any river; but any rights acquired under said act shall be confined exclusively to sinking shafts and mining beneath the beds of such rivers.

August 31, 1851, McCLURE, J., directed judgment to be entered for defendant.

This judgment was assigned for error.

OLIPHANT and T. WILLIAMS, for plaintiff in error.

MELLON, for defendant in error.

That the act of 24th March, 1849, was constitutional, he

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referred to *O'Conner* v. *Warner*, 4 W. & Ser. 223; *Lambertson* v. *Hogan*, 2 Barr. 25. "Until the judiciary has fixed the meaning of a doubtful law, upon which rights have become vested, it may be explained by legislative enactment." *O'Conner* v. *Warner*, *supra*.

The right to dig and mine for sand, gravel, etc., in the 100 acres granted to plaintiff in error by the commonwealth, by virtue of the act of 11th April, 1848, is within the Manor of Pittsburg, which is reserved to the late proprietary and his grantees, by the 8th Sec., act 27th November, 1779. The legislature therefore have no authority to grant the plaintiff in error any exclusive interest in the bed of the river within the Manor of Pittsburg; *Penn's Lessee* v. *Klyne*, 4 Dall. 402; 9 Wheaton, 270.

The opinion of the court was delivered September 29th, by GIBSON, C. J.

The question is, what did the State mean to grant by a warranty and survey of the bottom of the river? "From and after the issuing of the said warrant," says the statute, "the right to dig and mine for iron, coal, limestone, sand and gravel, fire clay and other minerals, shall vest and be in the party in whose favor the said warrant shall issue." The grant is therefore not of the soil, but a right to mine and dig in it, and to take to the use of the warrantee the product of his digging and mining, and everything he shall have made his own by the impress of his labor, but of nothing else. A right to dig for minerals is essentially different from a right to the soil. Nothing is more common in every part of the State where coal or iron abounds, than a right to dig for it below the surface of the ground, separated from a right to the surface itself. A grant of it conveys no more than a license to take and appropriate the minerals beneath; but it vests no property in them till they are taken and appropriated. The plaintiff had no better right, therefore, than had the defendant, to the sand deposited by the current, or rather, the right to use it was exclusively in the State. True, it is said in the third section of the act that the warrantee may receive "a patent for the land," but the generality of the expression is qualified by directing that the patent contains only a grant to

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dig and mine. The subsequent act, more distinctly restraining the generality of the terms, was unnecessary, and we are therefore relieved from a consideration of its constitutionality.

Judgment affirmed.

RIDDLE v. BROWN ET AL.

(20 Alabama, 412. Supreme Court, 1852.)

[1] **Grant of right to get ore—Statute of Frauds.** The "right to dig and carry away ore" from the mine of another, is an incorporeal hereditament or easement, and the contract for the sale of such a right, to be binding in law, under the Statute of Frauds, must be in writing. A verbal contract conferring such a right, though not binding under the Statute of Frauds, will, nevertheless, operate as a verbal license, and, while unrevoked, will protect the person to whom it was given from *trespass quare clausum fregit*, for digging ore, and vest in him the property in the ore that is actually dug under it.

[2] **Parol license revocable but not assignable—Trespass.** A verbal license to dig and carry away ore is revocable at the pleasure of the party by whom it is given, and is, moreover, personal, and not assignable. Such a verbal license given by A to B, and by B afterward transferred to C, will not justify C in entering by force the enclosure of A, in which the bank or mine of ore is situated—A being at the time the owner of the freehold, and warning C not to attempt to enter. C, in such a case, becomes himself a trespasser, and he may be repelled by A with all the force necessary to protect his possession.

[3] **Forcible resistance to trespass.** The owner of a mine in possession may resist with so much force as may be necessary, a trespasser, the pretended assignee of an unassignable license, entering to dig and take away the ore.

Evidence of malice to prove excessive force. Evidence of personal feeling and of previous threats, though uncommunicated to defendant, is admissible upon the question of whether excessive force was used in preventing a trespass upon the ore bank of defendant.

Error to the Circuit Court of Talladega.
Tried before the Hon. E. PICKENS.

This was an action of trespass *vi et armis*, brought by the plaintiff in error against the defendants for injuries to the person.

[1] *Arnold* v. *Richmond Works*, 9 M. R. 193.
[2] *Lockwood* v. *Lunsford*, 7 M. R. 532.
[3] 1 Hale's Pleas of the Crown, 485.

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The defendants pleaded the general issue, with leave to give any special matter in bar, in evidence.

The record exhibits the following state of facts: The difficulty arose in regard to the right of the plaintiff in error, as one of the firm of W. D. Riddle & Co., to enter on a certain tract of land with his wagon, to haul from thence a quantity of iron ore which had been previously dug from an ore bank situate on said tract by persons in his employ. This right was resisted by the defendants in error.

The right claimed by the plaintiff in error rested upon the following state of facts: One John M. Moore, who was in 1841 or '42 the owner of iron works in Talladega, entered into *a verbal* agreement with John F. Atkinson, one of the defendants, who acted at the time by the permission of his father, Stephen Atkinson, then the owner of the land on which the ore bank was situated, which is thus described in the bill of exceptions: "He (Moore) contracted with him (John F. Atkinson), for the right to dig and carry away ore from this bank, for one thousand pounds of iron, to be delivered from time to time, as he wanted it." Moore continued to get ore under this contract until March, 1843, when he sold out his iron works to Walter D. Riddle, the brother and copartner of plaintiff. The defendant John F. Atkinson, sent from time to time to Moore, under this contract, for iron, and got it until he sold out to Riddle. When Moore sold out to Riddle, he "let Riddle have the ore bank on the same terms that he had it," and made him a deed for it. The ore bank was in the woods, uninclosed at the time of this contract. It was afterward inclosed by Stephen Atkinson, but a gate was erected for Moore to pass in and out after ore with his wagons. Riddle went on getting ore for a considerable time after the sale by Moore to him.

It was in proof that the ore bank was, at the time of the difficulty, in an inclosure in which there was growing a crop, cultivated and belonging to the defendants; and the title to the land was in the defendant, John F. Atkinson, devised to him by the will of his father, Stephen Atkinson.

It was further proved that the said John F., the day before the difficulty, warned and forbade the wagoner of plaintiff not to pull the fence down or enter his inclosure any more to get ore.

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On the day of the difficulty the three defendants had stationed themselves near the gap, where the wagon of plaintiff commonly entered in going to the ore bank. They all had newly cut sticks. The plaintiff, in company with another person, rode up, and a conversation arose, in which defendant John F. declared that the wagon of plaintiff, which was then expected, should not enter the inclosure. The plaintiff, in a mild manner, expostulated with defendant, and told him that he did not want to settle rights by force, but insisted that he had purchased the ore bank, was in possession, and would go in. Defendant Atkinson on his part insisted that the possession was in him, and that plaintiff had no right to go in, and warned plaintiff not to take down the fence. Plaintiff then ordered his wagoner to take down the fence. Brown at this raised his stick, saying, "You had better not." Riddle then laid his hand on a rail of the fence, and at this juncture he was struck by John F. Atkinson, with his stick, and a fight ensued between the three defendants, on one side, and Riddle, his companion and the wagoner, on the other, all bearing some part, in which the defendants inflicted serious personal injury with their sticks on Riddle. Riddle also had a stick at the time, but it was his usual walking stick.

In the course of the trial, a witness testified that plaintiff had said, some time previous to this difficulty, "that Brown and Atkinson, the defendants, were endeavoring to prevent him from getting ore from this bank by threatening to beat him, but they could not do it; the ore bank was his, and he had possession of it; that as to John F. Atkinson, he did not mind him any more than he would a negro; that he could or would take a cowhide to him, if he interfered with him, and run him off the place." On cross-examination, the witness said he did not tell this to defendants until long after the fight occurred. Upon this, plaintiff moved to exclude the testimony, which the court refused, and plaintiff excepted.

It appeared that defendant John F. Atkinson was fully apprised of the sale of the right to get ore, from Moore to the Riddles, and that ore was procured by them at this bank for a considerable time thereafter.

The court charged the jury:

1. That if it appeared that Moore had obtained a verbal li-

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cense from Stephen Atkinson, or John F., in 1842, in consideration of one thousand pounds of iron, to be delivered from time to time as he wanted it, to dig and carry away ore from said bank, and that plaintiff had no other right to dig and carry away said ore, except what he had derived from Moore in his contract with said Moore, (the charge in the record says here, "*verbal* contract,") then the contract was void, and plaintiff had no right to enter said inclosure for the purpose of hauling off the ore that had been dug ready for removal, if defendants were at the usual place of entrance and forbade plaintiff from entering.

2. That if Moore purchased the right to dig and remove ore, as shown in the evidence, and it was a verbal agreement, then it was in the nature of a personal license, and that neither W. D. Riddle, nor plaintiff, as his copartner, had any right to enter, dig and carry away ore under it. To these charges plaintiff excepted, and requested the court to charge:

1. That if the jury believed, from the evidence, that Moore purchased of defendant John F. by the direction of his father, Stephen Atkinson, in 1841 or '42, the right to dig and carry away the ore from this bank, for and in consideration of one thousand pounds of iron, to be delivered to him from time to time, as he wanted it, and that he went into possession of said ore bank under said contract, and continued to haul ore until he sold to Wm. D. Riddle in March, 1843, and that he then let him have the right on the terms he had it, and that defendant John F. knew of it, and that Riddle, and plaintiff as copartner and agent, have continued in possession ever since up to the day when the difficulty occurred, then the plaintiff had, under such possession, such a right of entrance as entitled him to go in and out without forcible interruption or molestation from defendants; and that if defendants, while his team was gone with a load of ore, went to the usual place of entrance, and when plaintiff returned and attempted peaceably to enter, as aforetime, used force to prevent him, and the beating proved was then given, they must find for the plaintiff. This charge the court refused.

The admission of the evidence objected to, as aforesaid, and the charges given and the refusal to charge, as aforesaid, are severally assigned as error.

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WHITE & PARSONS, for plaintiff in error.

RICE & MORGAN, *contra.*

PHELAN, J.

It becomes necessary in this case to ascertain with some precision, in the first place, what interest or estate passed to Moore by the agreement entered into between him and defendant John F. Atkinson, by which the former was to have "the right to dig and carry away ore from the bank," in consideration of "one thousand pounds of iron to be paid to the latter from time to time as he wanted it."

Mines are a part of the freehold and, *prima facie*, the owner of the freehold has a right to the mines and minerals underneath; but this is only a presumption of law, that may be rebutted by showing a distinct title to the surface in one, and to that which is underneath in another, for mines may form a distinct possession and different inheritances from the surface: 1 Crabb, R. P. 93.

Again, there may be a right to dig ore in the mines of another, as distinct from the ownership of the mines as that may be from the ownership of the surface. This right to dig ore in the mines of another, if it be to one and his heirs, is an incorporeal hereditament: *Grubb* v. *Guilford*, 4 Watts, 223. It is a permanent interest in the land of another to which a legal title can only pass by deed, and of which no sale can be made, which is binding, unless reduced to writing, agreeably to the Statute of Frauds: 1 Gill & Johnson, 366; *Cook* v. *Stearns*, 11 Mass. 533.

Had the contract between Moore and defendant Atkinson been reduced to writing, and by deed, it would have created in Moore, I apprehend, by force of our statute, a fee simple in this easement—this "right to dig ore." An estate to him, where no less estate was expressly limited, would have been an estate to him and his heirs: See Statute, Clay's Dig. 156. But to give to it such an effect, it was indispensable that it should have been in writing. A verbal contract for an easement like this would have no more binding force in law, under the Statute of Frauds, than if it had been simply for the land itself.

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But if it be devoid of efficacy as a contract of sale, because not reduced to writing, is it therefore void for all purposes?

Not altogether. It may still serve the purpose of a license. And what is the extent to which it can go as such? A license, merely, a verbal license, is the right to do a particular act, or a series of acts, without any interest in the land. Such a license will exempt a party from an action of trespass for entering the land of another to dig ore, and will give him the property in the ore which is actually dug under it: *Doe* v. *Wood*, 2 B. & Ald.; 1 Crabb, R. P. 96. But such a license is revocable at any time, at the pleasure of him who gives it. We do not mean that all verbal licenses are revocable at pleasure; there are distinctions to be observed; but only such a license as that we are now considering: 1 Mass. 533; 4 John. 81; 1 Crabb, 425.

Such a license, moreover, is not assignable; the privilege it confers is personal to him to whom it is given. The conveyance of the land to another would be a revocation of such a license: *Wallis* v. *Harrison*, 4 M. & W. 538.

Having ascertained the principles by which we can determine between the conflicting claims of the plaintiff to enter the inclosure, and of the defendants to repel him from effecting such entrance, we will now proceed to consider that question.

The license given to Moore, and the digging and carrying away ore for years under it, would not have given to him even, much less to the plaintiff, the possession of the ore bank as against the owner. The possession remained during all the time with the legal title in defendant Atkinson, and this was even more emphatically true of the inclosure in which it was situated, in which defendants had a crop growing at the time. The idea of an adverse possession, either in Moore or Riddle, to whom he sold, upon which the counsel for plaintiff seemed somewhat to rely, has no just foundation. The possession of the inclosure was with all the defendants at the time—with the defendant John F. Atkinson as owner, and with the other defendants as his copartners in cultivating the same.

No license to enter on that possession existed in the plaintiff at the time of the affair. The license that had been given was personal to Moore, and could not be transferred to the

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plaintiff; but such a license was revocable at pleasure, and if the right to enter had been claimed by Moore himself, instead of plaintiff, it was sufficiently revoked by the notice to the wagoner the day before; and, at all events, by the warning to the plaintiff not to enter at the time of the difficulty. He persisted, however, supposing, no doubt, that he was only maintaining his lawful right. In this he was mistaken. It behooves a man to proceed with great precaution when he determines to vindicate a supposed possession against another who is in or on the premises. As must appear from the principles already stated, the possession, and the right in law to defend and maintain that possession against all the world, was with the defendants. It follows that plaintiff, in making the attempt he did to enter the inclosure, was himself a trespasser, and that defendants were justified in repelling his attempt.

These views sufficiently indicate that we find no error, either in the charges given by the court or in the refusal to charge as plaintiff requested.

The next assignment of error relates to the admissibility of the evidence showing that plaintiff, after alluding to certain threats of the defendants, had spoken in a very contemptuous manner of the defendant John F. Atkinson, and had made threats of what he would or could do with him in certain contingencies, before the beating took place, although the witness stated that he had not told the defendant of this until some time afterward.

One point made in the case of the plaintiff, in the trial below, as appears from the record, was, that admitting the lawfulness of defendants' possession, the beating was excessive and beyond what was necessary for the defense and maintenance of their possession, and that defendants were guilty of trespass on that ground. I must say that the facts contained in the record show a case of severe, and it seems to me, unnecessary infliction of personal injury upon the plaintiff; but this was a matter purely for the jury to determine, under all the facts and circumstances of the case, to whom the court properly left it.

We see no objection to the evidence admitted, at least to a portion of it, and the objection was general.

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It was competent to show that angry feelings had arisen between these parties, in regard to their respective rights to the possession of the ore bank, previous to the beating, in order to show that plaintiff would naturally expect and come prepared to meet a vigorous resistance, if he was determined to proceed to assert his right to the possession by force, and this might serve to palliate or excuse the conduct of the defendants.

There is no error in the record, and the judgment below is affirmed.

THE JOHNSTOWN IRON CO. v. THE CAMBRIA IRON CO. ET AL.

(32 Pennsylvania State, 241. Supreme Court, 1858.)

[1] **Incorporeal hereditament.** A grant of the privilege of raising iron ore on the lands of the grantor at a certain price per ton, is an incorporeal hereditament; it is not a sale nor is it a mere license revocable at the will of the grantor.

Not exclusive. Such a right is not exclusive in the grantee, but to be enjoyed in common with the grantor, his heirs and assigns; *Caldwell* v. *Fulton*, 31 Pa. St. 475, distinguished.

In equity. This was a bill in equity exhibited by the Johnstown Iron Co. against The Cambria Iron Company, D. J. Morrell and Charles Wood, to restrain the defendants from digging, mining, taking or carrying away any iron ore from a tract of land called the "Benshoof tract," the complainants claiming to be seized and possessed of the sole and exclusive right, liberty and privilege of mining, digging, taking and carrying away all the iron ore lying in, upon or underlying the same, and from obstructing the complainants in their said right.

The bill set forth that on the 21st March, 1864, Peter Livergood was seized of the legal title to the "Benshoof tract," and that his son-in-law, John Benshoof, was and had been for about fourteen years in possession thereof, under an

[1] *Funk* v. *Haldeman*, 7 M. R. 203.

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equitable title, taking the rents, issues and profits, and claiming the same as his own.

That on that day the said Peter Livergood, Robert P. Linton, Jacob Livergood, Peter Livergood, Jr., and John Benshoof, entered into articles of partnership for the purpose of erecting and carrying on, under the name of Peter Livergood & Co., a blast furnace, to be called the "Johnstown Furnace," upon a part of the said tract, containing fifteen acres, wherein it was agreed that Peter Livergood, Sr., should convey to each of his said partners the one undivided fifth part of the said fifteen acres of land, to be credited to Benshoof in the construction of the works, and that Benshoof should give to the said firm "the privilege of raising iron ore on his fields at twenty-five cents per ton, and also the privilege of raising the iron ore on his woodland (after his contract with McGill & McKiernan is filled), at the same price (twenty-five cents per ton), and to give the privilege to none else."

That after the erection of the furnace, Peter Livergood, Sr., on the 19th April, 1848, by writing under his hand and seal, consented to, and ratified the agreement so made with the company by John Benshoof; and agreed that the said company and their assigns should have the privilege of roads through his lands and those of Benshoof, for the purpose of hauling the ore from the banks then opened, or thereafter to be opened.

That the fields and woodland of Benshoof, referred to in the said articles and agreement, were part and parcel of the said "Benshoof tract," and that the banks or mines referred to in the agreement, as being then opened, were also upon the same tract, and were then worked and continued to be worked by the said corporators and their successors, owners and proprietors of the same furnace, until about the year 1854, without hindrance, interruption, or objection from any quarter.

That on the 6th February, 1849, Peter Livergood, Sr., conveyed to his co partners the four undivided fifth parts of the said fifteen acres upon which the furnace was erected, with the appurtenances, and at the same time transferred the remaining fifth part thereof, with the appurtenances, to one John Linton; and that all and several the interests of the said copartners in the said furnace and land, with the appurtenances, afterward became vested by divers mesne conveyances in John Linton,

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Robert P. Linton and John Galbraith; by whom the said furnace was carried on under the name of Lintons & Galbraith.

That in October, 1851, under an execution against Lintons & Galbraith, the said furnace and the right, title and interest of the defendants in and to the wood and ore privileges in the lands of Peter Livergood, Sr., and John Benshoof, as described in their articles of copartnership, were levied upon and sold by the sheriff of Cambria county, to Rhey, Matthews & Co.

That on the 1st October, 1852, John Benshoof conveyed to Rhey, Matthews & Co. all the iron ore in the lands, owned by him or in his possession, including the "Benshoof tract," and that on the 16th May, 1855, Rhey, Matthews & Co. conveyed the said furnace and wood, ore and coal privileges to the complainants; whereby they claimed to be entitled to the sole and exclusive right and privilege of digging, mining, taking and carrying away all the iron ore lying in, upon or under the said "Benshoof Tract."

And the complainants charged that the defendants, Wood and Morrell, claiming under a lease from the Cambria Iron Co., had entered upon the said "Benshoof tract," and mined and carried away large quantities of iron ore, to the exclusion of the complainants, the defendants claiming the right to do so by virtue of a deed from Peter Livergood, Sr., to the Cambria Iron Co., dated the 31st August, 1854. They therefore prayed that the defendants might be restrained from so doing, or from obstructing the complainants in the exercise of their exclusive right to take the iron ore upon the said tract.

The answer admitted that Peter Livergood, Sr., on the 21st March, 1846, was seized of the legal title to the "Benshoof tract," but denied that Benshoof occupied or held the same under any equitable title, or under any other title than as a mere tenant at will of his father-in-law, the said Livergood, or that Livergood had ever been out of possession, as owner, until he conveyed to the Cambria Iron Company in 1854; or that Benshoof ever claimed the same or any part thereof as his own, or that he ever had any written lease or other evidence of title thereto, or paid anything therefor, or made any improvements thereon.

That the firm of Peter Livergood & Co. was formed as stated in the bill; that they put the said furnace in operation by the name of the Mt. Vernon Furnace, and that Peter

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Livergood executed the agreement of 19th April, 1848, as stated in the bill; that the fields and woodland therein mentioned were part of the "Benshoof tract," and that the said banks and mines were situate on land of which Peter Livergood was so seized, and on other lands belonging to him.

That the interest of the said copartners in the said fifteen acres and furnace became vested in Lintons & Galbraith, and that Livergood conveyed to his copartners and John Linton, as stated in the bill, but denied that the right and privilege of raising ore were embraced in said conveyance, or were, in any manner, appurtenant thereto.

That on the 1st June, 1847, the firm of Peter Livergood & Co. was dissolved; that on the same day the firm of Livergood, Linton & Co. was formed, who carried on the business under the name of the Johnstown Furnace; but the answer denied that the firm of Lintons & Galbraith ever had any estate, title or interest in the said right or privilege of raising iron ore mentioned in the said articles, or that Rhey, Matthews & Co. derived any interest thereto by virtue of the sheriff's deed. The answer further denied that the said right ever became vested in the complainants, or that they had such sole and exclusive right as stated in their bill, or that on the 16th May, 1855, the Johnstown Iron Company had any valid or legal existence.

And the defendants claimed that by the deed of 31st August, 1854, from Peter Livergood, Sr., to the Cambria Iron Company, the said company became seized and the owners of the premises, free, exempt and clear of all or any rights and privileges of the complainants or others to raise or take away iron ore therefrom, submitting the construction of this deed to the court. This deed contained the following exception and covenant:

"Saving and excepting now and at all times hereafter any claim or claims, right, title or interest whatsoever which may arise to the same or any part thereof, by reason or on account of the following stipulations as contained in the articles of agreement between the parties of this indenture, that is to say: 'Whereas John Benshoof, by a certain article of agreement establishing the firm of Peter Livergood & Co. in the Johnstown Furnace, which article bears date the thirty-first day of March, A. D. eighteen hundred and forty-six, gave the

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privilege to the said firm to mine iron ore from the said premises, for twenty-five cents per ton, and gave that privilege to no one else, which privilege was subsequently ratified by the said Peter Livergood; and whereas George Rhey, of the late firm of Rhey, Matthews & Co. claims the privilege of mining the iron ore from the said premises by reason of the said firm of Rhey, Matthews & Co. being the vendees of the sheriff of Cambria county of the interests of Lintons & Galbraiths to mine said ore;' now it is distinctly understood by the parties to this agreement, that if the said Rhey, Matthews & Co., as the vendees aforesaid, are entitled, in law or equity, to mine said ore on said premises, then and in that case the said Cambria Iron Co. agrees upon their part to fulfill the covenants and agreements, grants, gifts or privileges that the said John Benshoof was bound to fulfill upon his part in his agreement as aforesaid, so ratified by the said Peter, and the said Peter hereby agrees that the said Cambria Iron Company are to have all the consideration and emoluments that the said John Benshoof was to receive per ton of iron ore, and otherwise as per said articles of agreement."

The cause came on for hearing on bill, answer and exhibits, and was argued by

WILLIAMS & SPROUL, for the complainants.

LOOMIS, for the defendants.

The opinion of the court was delivered by WOODWARD, J.

This case is here on bill and answer. The bill alleges that on the 21st March, 1846, Peter Livergood was seized of the legal title of the Benshoof tract, and that his son-in-law, John Benshoof, was then, and has been for about fourteen years, in possession thereof under an equitable title, taking the rents, issues and profits and claiming the same as his own.

The answer admits the legal title of Peter Livergood on the 21st March, 1846, but denies the equity of Benshoof, and alleges that he was a mere tenant at will of his father-in-law, Livergood.

As no proofs have been taken, and the exhibits offered no

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evidence of title in Benshoof, we must assume that he had none beyond a mere possession, and that the title of the tract, both legal and equitable, was in Peter Livergood. That title he conveyed to the Cambria Iron Company by a deed of himself and wife, on the 31st August, 1854. But whatever rights to the iron ore of the tract had been previously granted to the Johnstown furnace, or to the parties under whom that company claims, were expressly saved and reserved out of this conveyance to the Cambria company. There was another special reservation of iron ore, enough to fulfill a contract made between John Benshoof and McGill & McKiernan, but as this does not enter into the present controversy, it may be laid out of view.

The Cambria Iron Company then holds the Benshoof tract exactly as Peter Livergood held it on the 31st August, 1854, neither more nor less. If he had parted before that date with all rights to the iron ore upon the tract, the Cambria Co. acquired no iron ore by their purchase of the tract. But if the outstanding mineral right was a mere license to take ore in common with Livergood, or if it had terminated by its own limitation, their purchase vested them with a clear and exclusive right to the iron ore. It becomes necessary, therefore, to look back of the deed of 1854 to see what had been done in respect to the iron ore of the "Benshoof tract."

On the 21st day of March, 1846, Peter Livergood, Robert P. Linton, Jacob Livergood, Peter Livergood, Jr., and John Benshoof, entered into partnership, by articles of agreement, for the purpose of erecting a furnace for making iron in Conemaugh township, Cambria county. Peter Livergood owned the fifteen acres of land on which the furnace was to be built, and the agreement bound him to convey, as soon as the furnace should be in blast, four undivided fifths of the lot, to the other members of the firm, in consideration of $1,400; which sum was to be credited to John Benshoof on account of his part of the expenses of erecting the furnace.

After providing for other matter the agreement proceeds with a clause in these words: "And the said John Benshoof further agrees to give to the said firm the privilege of raising iron ore in his fields at twenty-five cents per ton, and also the privilege of raising the iron ore on his woodland

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after his contract with McGill & McKiernan is filled, at the same price (twenty-five cents per ton), and to give the privilege to none else."

The fields and the woodland mentioned in the above clause are to be understood as upon and forming part of the Benshoof tract. Now, although the case as represented to us compels us to regard Benshoof as a mere tenant of the tract, without any such title thereto as would enable him to make a valid grant of the iron ore, yet this circumstance does not affect the question to be decided, because on the 19th day of April, 1848, Peter Livergood executed a paper under his hand and seal, wherein he said, "I do hereby agree to and ratify the agreement as made with the above company by John Benshoof." The instrument then goes on to secure to the company, and their assigns, the right of way for hauling the ore from the banks now opened, or that may hereafter be opened.

Perhaps without this paper the legal effect of the common agreement, signed by all the partners, would have been to bind Peter Livergood to make good the stipulations which he permitted and encouraged his tenant and son-in-law to enter into in respect to the ore right; but whether so or not the express ratification above cited would, beyond question, conclude him. The two instruments are to be taken together and so taken they constitute something more than a mere license, revocable at the will of the licensor. They are a valid grant to the firm of Peter Livergood & Co., and to their assigns, of an incorporeal hereditament. It was not a sale of all the iron ore in the land for a round sum, as in the case of *Caldwell* v. *Fulton*, 7 Casey, 475, but of a privilege of raising iron ore at twenty-five cents the ton. It was a right exercisible with the lands of another, and therefore falling strictly within the definition of an incorporeal hereditament. It was not a sale of all the ore, notwithstanding the stipulation that the privilege was to be given to none else, because it was to be paid for by the ton, and of course no more was sold than should be raised.

That such a right was not exclusive in the grantees, but was to be enjoyed in common with the grantor, his heirs and assigns, has been held in all the cases from that of Lord Mountjoy, (best reported in Godbolt, 24,) down to *Grubb* v. *Guil-*

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ford, 4 Watts, 224, and *Grubb* v. *Bayard*, 2 Wallace, Jr., 100. The language of Lord Ellenborough in *Chetham* v. *Williamson*, 4 East, 476, is, that no case can be named where one who has only a liberty of digging for coals in another's soil has an exclusive right to the coals, so as to enable him to maintain trover against the owner of the estate for coals raised by him.

It seems to us very clear, therefore, that Peter Livergood had remaining in him, when he conveyed to the Cambria Iron Company, the whole title to the Benshoof tract, iron ore and all, subject only to the outstanding right of his former partners and their assigns to take iron from the land at twenty-five cents a ton. This disposes of the plaintiff's case; for assuming that they have succeeded to the incorporeal hereditament, they have not established an exclusive right, and are, therefore, not entitled to the injunction prayed for. Their bill is founded not on a right in common, but on an exclusive right to the iron ore, and failing to establish that they have no equity to demand the relief sought. Some difficult questions are raised upon their title, whether they are indeed assigns of the firm of Peter Livergood & Co. and whether this ore right could pass as an appurtenant of the furnace they held; but we do not go into them, because it is not necessary, and therefore not proper, as the case now stands. We allude to these questions only to guard ourselves against being understood as having decided them. Our decree rests on the case as the plaintiffs have presented it. Assuming them to have what they claim, the title to the incorporeal hereditament, we hold them not entitled to use it to the exclusion of the defendants, and therefore dismiss their bill.

And now, to wit, January 3, 1859, this cause having been argued by counsel, it is considered and decreed that the bill of the plaintiffs be dismissed at their costs.

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BEATTY ET AL. V. GREGORY ET AL.

(17 Iowa, 109. Supreme Court, 1864.)

Licensee, a tenant at will. A parol license to mine, reserving royalty, followed by expenditure made by the licensee, can not be terminated by the licensor without giving the notice to which a tenant at will is entitled.

Ejectment by licensee. The licensee of a mine, wrongfully ousted by the owner, may maintain ejectment to recover possession.

[1] **Forfeiture, a question of fact.** Whether a license has been forfeited or abandoned is a question of fact for the jury to pass upon.

Private custom of lessor. A lessee is not bound by the private custom of his lessor in regard to his mines or lands not shown to have been known to him when he entered upon them.

An assignee is bound by the knowledge of his assignor.

The general custom of miners forms a part of a contract for the working of mines in the absence of express terms, or of a private custom of the lessor not known to both parties.

[2] **Elements of, and reasonableness of, custom** to allow workings to be idle in certain cases, considered.

Appeal from Dubuque District Court.

EJECTMENT. It will be necessary carefully to state this case, in order to understand the questions presented. The action was brought under chapter 144 of the revision, to recover the immediate possession of, and the hereinafter described interest in, the following real estate, viz.: "The mineral diggings, shaft, crevice, drift and range thereto belonging, known as the Brugh Crevice or Diggings, and situate in the S. E. ¼ of Sec. 33, T. 89, R. 2," etc. Plaintiffs allege, "that they have a valid, subsisting interest therein, and the exclusive right to carry on the business of mining for lead ore on said premises, subject to the payment of one sixth of the mineral raised therefrom, as rent for the ground, under a miner's lease, for an indefinite period; that defendants keep them out of possession, to their damage $5,000, on account of the loss of rents and profits," etc. Dunn answers, disclaiming all interest. Gregory answers, 1st, by way of general denial; 2d, by claiming that he is in the rightful possession, as the tenant of one Richard Bonson, and, as such tenant, using the premises for the purpose of mining for lead ore.

[1] *Karns* v. *Tanner*, 5 M. R. 289.
[2] *Wilson* v. *Henry*, 1 M. R. 152.

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From the testimony, all of which is before us, the following facts are either admitted or clearly shown, viz.:

First. That Richard Bonson was the owner of the mineral land, or lot, on which the crevice, range or lead, called in the testimony the "Brugh crevice," was situated, this being the one in controversy in this action. In 1860, or 1861, the plaintiff P. H. Brugh, began to work and mine on said premises. The plaintiff himself testifies that he thinks he got the claim or right to mine from one Lockey, but Bonson testifies that Brugh obtained the right to work from him, and it is certain that the plaintiff did work with the assent of Bonson, agreeing to pay the latter as rent, or compensation, one sixth of the mineral raised.

No written contract or license is pretended. In the course of his work Brugh sunk six shafts, in the fourth of which a little mineral was obtained. The plaintiff testifies, and Mr. Bonson admits the fact, in his testimony, that in June or July, 1861, the damps were so bad that he concluded to quit till fall. "I went to Mr. Bonson, and he inquired how I was getting on. I told him how the damps were, and that I had to rig a furnace, and then could some days use only one blast a day. I then told Bonson I would quit till fall, till I could run the drift. This was either in 1861 or 1862." [Bonson thinks it was in 1861, but don't recollect the time he gave Brugh.] "Mr. Bonson then asked if I calculated to work this fall. I said 'yes;' and he said, 'I shall reserve or keep the diggings for you, and you see me again.' This was the last conversation I had with Mr. Bonson from that day to this."

Second. Shortly after, that is, in 1861 or 1862, Brugh sold his right in the range, or diggings, to Charles Beatty, Henry Shuler and either Owen, or James Dunn—it is not material in this suit which—for $80, provided sufficient mineral to pay that sum should be raised from the premises; and these parties continued to hold, and more or less work on the premises in controversy, till, as defendants admit, February and March, 1863. Shuler and Dunn, June 26, 1863, according to Brugh's testimony, surrendered, as they had agreed to when they were done with them, "the premises back," to plaintiffs. Meanwhile Beatty died, and his heirs join with Brugh in bringing this action. When Shuler and Dunn quit work, they reserved wind-

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lass, tools, etc., and no work was done from March, 1863, till September, 1863, when it was done by Gregory, one of the defendants, under permission from Bonson. That is, though the plaintiffs claim that the premises were surrendered to them in June, they admit that they did no work upon them after that time.

For this failure the plaintiffs assign two reasons:

1st. That the plaintiff Brugh was sick, and that being sick, his right under the *custom of miners* would not be forfeited by non-user while sick.

2d. That the damps prevented working the mine, even if he had been well.

3d. Gregory and Dunn commenced work on the premises with the knowledge of, but without objection at the time, from the plaintiffs. Brugh's testimony on this point is: "I was at work three or four hundred yards off when I heard that they jumped the claim; heard but did not go over; do not know, but probably saw them (defendants) every day." Defendant cleaned out the shaft, sunk it a foot deeper, drifted fifty feet, and found a small piece of mineral; Drifted twenty feet further, and found another piece, and at one hundred feet, 300 pounds," etc. At the end of about five or six weeks, 20,000 pounds of mineral were raised, worth from $55 to $60 per thousand pounds. Afterward this suit was brought. The above outline of the material portions of the testimony is probably sufficient to exhibit the nature of the controversy between the parties, and to make intelligible the questions of law raised on the trial. It will be seen by this statement that a most material question on the trial was, *whether the plaintiffs' rights were forfeited or abandoned, by reason of a failure to work on the premises from March*, 1863, *till September*, 1863. To establish that they were abandoned or forfeited, the plaintiffs claimed the right to show that by the *general custom* of miners, bad air or sickness of the miner, will, while it lasts, operate to hold the ground and preserve the right. Mr. Bonson testifies that it was a uniform rule with him "that a tenant loses his right when he ceases to work." He did not testify that Brugh knew of this rule, but stated facts from which a jury might, perhaps, infer it. Brugh, in his testimony, however, denied any knowledge of this rule. The court refused to allow the general custom of

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miners to be shown as to the effect upon their mining rights of tenants quitting work. To this the plaintiff excepted, and also excepted to the court's allowing Mr. Bonson to testify as to his private rules, without connecting the plaintiffs with knowledge thereof. The other facts, so far as material, will be stated in the opinion. There was a trial by jury, who, under instructions from the court, also excepted to, found for defendants. Plaintiffs appeal.

JOHN H. O'NEILL and ALONZO CRAGIN, for the appellants, cited Bainbridge on Mines, 84, Sect. 1, 124; *Clayton* v. *Blakey*, 8 Term R. 3; *Comyn* v. *Kyneto*, Cro. Jac. 150, and the cases there cited; *Cullen* v. *Rich*, Bull. N. P. 102; *Andrews* v. *Whittingham*, Carth. 277; S. C., 1 Salk. 255; *Crocker* v. *Fothergill*, 2 B. & Ald. 652; *Wilson* v. *Mackreth*, 3 Burr. 1825; *Doe* v. *Taylor*, Moore, 355; *Northam* v. *Bowden*, 24 L. J. N. S. Exch. 237; Coll. on Mines, 18; *Doe* v. *Wood*, 2 B. & Ald. 724; Adams' Eject. (4th Ed.) 20.

MONROE & DEERY, for appellees.

DILLON, J.

I. Chapter 144 of the Revision provides that, "Any person having a *valid subsisting interest* in real property, and a right to the immediate possession thereof, may recover the same by action:" Sect. 3569. Assuming, for the present, that the plaintiffs' rights, as the parol licensees of Bonson, the owner, had never been forfeited or terminated, the first question is, can they assert those rights in *this form of action?* Let us suppose a simple and uncomplicated case, and one which, from the testimony, we infer to be of not unfrequent occurrence: Mr. Bonson, as the owner of a large quantity of mineral lands, is applied to for the right to mine upon them. He replies: "I will give you the right you desire, you paying me, as rent, one sixth of all mineral discovered;" nothing is said as to the duration of the right, or the mode of termination. The miner, upon the faith of this permission, takes possession, expends his labor and money in sinking shafts, running drifts, purchasing tools, providing machinery, etc. Lay-

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ing out of view any rights derivable from custom, and applying to the case (in the absence of special contract regulating the rights and duties of the respective parties), the ordinary rules of the law, can the owner instantaneously and absolutely revoke the license, so as, from that moment forward, to treat the miner as a trespasser or intruder? Most clearly not. It would be a shame and reproach to the law, if this could be done. The general principles of the law are against it: *Winter* v. *Brockwell*, 8 East, 308; *Wickersham* v. *Orr*, 9 Iowa, 253, 260 and cases there cited; *Rerick* v. *Kern*, 2 Am. Lead. Cases, 733, and the valuable note of the learned editors, and the authorities there collected, as to executed licenses. And, in the absence of an established custom, or usage, or contract, giving larger or other rights, such a miner being in possession of real estate, with the *assent of the owner*, would, by *statute*, be a *tenant at will* (Rev., Sect. 2216) and entitled to the rights of such a tenant in regard to notice to quit.

Considering the importance of the lead mining interests of Iowa, that the rights of owners and miners are wholly unregulated by statute, it is surprising that so little litigation growing out of this great interest has ever reached this court. And yet, in almost the only case ever before it at all similar to the present, and which counsel seem to have overlooked, the above principles are directly asserted and enforced: *Bush* v. *Sullivan*, 3 G. Greene, 344. In that case the defendants were in possession of the plaintiffs' mineral land, by virtue of an unlimited parol license, and had made large expenditures in improving the ground, under an arrangement that the plaintiff was to have one fourth of the mineral raised, as his rent; and the plaintiff brought ejectment. There was no question of rights under a custom in the case, and the court held that the owner could not maintain his action without refunding the expenditure, or giving the notice to which a tenant at will is entitled. While some of the observations *arguendo* in that case may admit of question, the *decision* itself, under the facts, was just and proper. If the miner has, under such circumstances, such rights as that he can not be ejected by the owner, it seems to us to follow that he may, by virtue thereof, assert his right to possession against the owner, and his subsequent lessee or licensee with notice, if they unjustly interfere

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with it. In the case at bar the following, with the exception of an introductory statement, constituted the entire charge of the court to the jury:

2d. "To sustain this action on the part of the plaintiffs, all the evidence introduced by them tends to prove that the only interests of the plaintiffs in the premises claimed consists in a license to work and mine on the premises described in the petition, under a parol license from Richard Bonson, the owner in fee of the premises, which right so tending to be proved is a simple right to enter upon the premises under such license, and to dig and search for lead mineral therein, and for no other purpose, and without any property in the minerals, if any, on the premises in the plaintiffs until discovered by them."

3d. "In my opinion this does not tend to prove such an interest in real estate in the premises in the plaintiffs as entitles them to maintain this action and recover therein. And there being no evidence before you of such a title and interest in the plaintiffs in the premises as will entitle them to recover, the defendants are entitled to your verdict."

Whether the interest of the plaintiffs had ever been forfeited, terminated or abandoned, was one of fact for the jury, to be determined by them from the evidence under proper instructions. This question the plaintiffs, by their instructions (all of which were refused), sought to get before the jury. And whatever may be our opinion upon the evidence, as it now stands, as to the abandonment of their right by the plaintiffs, we are clear that they had the right, under our statute and practice, to have this question distinctly submitted to and decided by the jury. In considering, therefore, whether the case ought to be reversed for error in the above charge, we must assume that the plaintiffs took possession with the consent of Bonson, expended money and labor on the faith of such consent, and that their right had never been forfeited or abandoned. On this assumption it is our opinion that they would have such an interest in real estate as would entitle them to bring an action in this form to recover it, and thus be restored to their crevice or diggings. Such being our opinion, upon the general principles of justice and law, let us now take a brief view of the authorities to see whether this opin-

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ion is in harmony with adjudged cases. The general rule is that ejectment will lie for anything of which the sheriff can deliver possession. Therefore it may be maintained for corporeal but not for incorporeal hereditaments: Adams on Eject., Ch. 2, pp. 18, 20, and cases.

As applicable to miners and mining interests, this distinction results from the above rule: a *privilege to dig*, not amounting to an actual demise of the mines, is an incorporeal hereditament, and consequently ejectment will not lie: *Doe* v. *Wood*, 2 B. & Ald. 724; *Lord Mountjoy's Case*, 4 Leon. 147; Godbolt, 24; *Chetham* v. *Williamson*, 4 East, 469; *Crocker* v. *Fothergill*, 2 B. & Ald. 661, judgment of HOLROYD, J. And see *Wilkinson* v. *Proud*, 11 M. & W. 33, and *Stoughton* v. *Leigh*, 1 Taunt. 402. And especially under the above authorities is this so, where such license is not exclusive and does not oust the grantor of his rights.

But a distinction, in many cases, is drawn between an unopened and an open mine. And the books abound with cases, from a very early period, which decide that ejectment will lie for mines, though another has the surface. We refer to the following: *Comyn* v. *Kyneto*, Cro. Jac. 150. In *Whittingham* v. *Andrews*, 1 Salk. 255, "It was not questioned" (citing Cro. Jac. 150) "that ejectment lies of a coal mine;" S. C., Carth. 277, S. P.; *Comyn* v. *Wheatley*, Noy, 121; and see *Lewis* v. *Branthwaite*, 2 B. & Ald. 437; Bainb. on Mines, 493, 494; Collier on Mines, 18 (top); Adams on Eject., 20 (marg.); *Doe* v. *Wood*, 2 B. & Ald. 724, and cases cited *supra*. Many of these cases, while holding that ejectment lies for an open mine, throw no light upon the question as to *the interest in the plaintiff* necessary to maintain the action. On this subject Mr. Adams is of opinion (Eject., page 20, marg.) that "When a grant of mines is so worded as not to operate as an actual demise, but only license to dig, search for and take metals and mineral within a certain district, *it seems that a party claiming under such a grant, and who shall open and work, and be in actual possession of, any mines, may, if ousted, maintain ejectment with respect to them;* but he can not maintain ejectment, either in respect of mines within the district" (*i. e.*, lying within the bounds of his privilege) "which he has not opened, or which, having opened, he has abandoned."

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See, also, Bainb. on Mines, 494; Collier on Mines, 18. We are satisfied that this rule is a reasonable one, and we adopt it as being the law. The court's charge, it must be observed, omits any allusion to the material facts of possession, and expenditures of money and labor by the plaintiffs, under the license from Bonson. The questions in the case should have been submitted to the jury, thus: "Were the plaintiffs' rights forfeited or abandoned? If so, that is an end of the case; if not—that is, if those rights were still subsisting and had not been determined by abandonment or forfeiture—then, as they had taken actual possession and expended money, they would be entitled to be restored to the possession of their mining right. What they could recover as damages or rents and profits, with respect to the mineral raised by the defendants, has not been discussed by counsel, and we pass the question by as not being necessarily before us. See observations of ABBOTT, Ch. J., pp. 738, 739, in the above cited case of *Doe* v. *Wood*. Our conclusion, then, on this part of the case, is this: omitting any allusion to the charge as trenching upon the province of the jury, it was, agreeably to the above views and authorities, correct as to the rights of a bare licensee, without actual possession, or the right to actual possession. But the error consists in taking from the jury, against the objection of the plaintiffs, the question whether the plaintiffs had abandoned, or lost, or forfeited, their actual possession or right to actual possession. If not, the jury should have been charged that they had such an interest as would entitle them to maintain ejectment.

II. We also think the court below held too tight a rein upon the plaintiffs, in refusing to allow them to show the *general custom* of miners. The plaintiffs offered to show what, by the general custom of miners, was the effect upon the miners' right, license or claim, as to forfeiture by reason of a failure to work the ground, and to show that sickness or bad air would, for the time being, under the custom of miners, excuse continuous working, and prevent the forfeiture of the right which would otherwise take place.

This testimony seems to have been rejected on the ground that there was a "local or private custom in regard to this particular land."

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This refers to the testimony of Mr. Bonson, the owner, who stated: "This rule is a uniform rule with me, that a tenant loses his right when he ceases to work."

"When I know damps to exist, I do not resume the ground." "If a man was sick and unable to work for two weeks, and I knew it, I would not resume the ground." "My rules have never been written or published, I keep them only in my mind." "These are my rules as laid down in the neighborhood." "If a person comes to me to rent ground, I ask him if he knows my rules, and he says 'yes,' I say, 'go to work.' If he says he does not, I tell him my rules." "*I do not remember as I ever talked with Mr. Brugh*, the plaintiff, about any of my rules." Mr. Brugh testified, that he "did *not know* any of Bonson's rules, except his right to a preference of mineral obtained on his premises." Under these circumstances, the jury should, in substance, have been directed—

1st. That Bonson's private rules would not affect the plaintiffs' rights, unless they had knowledge thereof, or unless they held as the assignees of persons who had such knowledge, and whether they or their assignors had such knowledge would be for the jury to determine from the evidence. If the plaintiffs had such knowledge, these rules would constitute part of the contract, and evidence of any *general custom* inconsistent with, or different from them, would be disregarded.

But, 2d. If the plaintiffs had no knowledge of Bonson's rules, and if there was no contract with respect to the assignment or duration, forfeiture or mode of termination of the plaintiffs' rights, these matters would depend upon a general custom in these respects, and upon the law. The custom which is evidenced and proved by usage (2 Parsons on Contr. 55, 56, and notes) must be *established*, and not casual, though no particular length of time is necessary to establish it, uniform, and not fluctuating, when contracts are not made to the contrary, and *general*, that is, general among mineral land owners and miners. The *onus* to establish such a custom is on the plaintiff. If, for example, there is an established custom, generally understood and received, that sickness or bad air, when nothing is said to the contrary, shall excuse, while it lasts, actual working, then a license given in a place where

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such a custom exists, would be presumed to have been made with reference to it, and such a custom would be considered as being tacitly annexed to, and as forming a part of, the contract between the parties. The same observations will apply as to the right of the licensee to assign and sell his privilege. In the absence of any contract or established custom, the right of a licensee to dig, paying a part as rent, would, by the law, be considered personal; for otherwise a license to A would practically be one to B, and the owner's rights might be seriously affected. But a *general custom*, recognizing the assignability of these mining rights, would probably not be so unreasonable as to prevent its being upheld.

3d. Where there is no special contract, and no general custom, the general rules of law govern the rights of the parties; and these, so far as they arise on the record, have already been sufficiently adverted to. The novelty and importance of the case clearly justify the space it occupies. It has been found impossible to treat it with greater brevity, and yet to treat it with clearness and precision. For the reasons above indicated, the judgment of the district court is reversed, and the cause remanded for a new trial.

Reversed.

UPTON & SWIVEL v. BRAZIER ET AL.

(17 Iowa, 153. Supreme Court, 1864.)

License limited to single vein. License to mine: *Held*, under the evidence, restricted to working in the vein and not to allow digging for float and to be confined as to the ground to one range at a time.

Not exclusive. A license, unless otherwise clearly expressed or necessarily implied, will not be held to be exclusive.

[1] **Revocable.** A parol license, not accompanied by possession or expenditure, is revocable.

Appeal from Dubuque District Court.

Equity. The defendant, Eiffes, being the owner of certain land, about one hundred and sixty acres, in Dubuque county,

[1] As to executed license, see *Wilson* v. *Chalfant*, 15 Ohio, 248; 45 Am Dec. 574 and note; *Yunker* v. *Nichols*, 8 M. R. 64.

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in August, 1860, gave to Nicholas Tarter, Charles Linden and F. J. Cramer, *a parol license* to mine for lead ore, they paying for the privilege one fifth part of all mineral raised. The *extent* of this privilege is one of the principal matters in dispute, and the controversy in this respect will be further referred to in the opinion.

The plaintiffs, Upton and Swivel, claim to be the assignees of the original license granted to Tarter, Linden and Cramer. They further aver that they, and those under whom they claim, had been in possession of said premises, working and enjoying the benefit of this mining right or privilege, unti about August, 1862, when Eiffes, colluding with the defendants Brazier and Buckle, allowed the latter to enter upon and take possession of the mines of the plaintiff, who pray for an injunction, restraining defendants, whose insolvency, except as to Eiffes, is alleged, and for an account. Defenses: First, denial of any right in the plaintiffs, these rights having been forfeited and abandoned; and second, alleging that the right, if subsisting, did not embrace or extend to the mines worked and claimed by the defendants. Certain special issues were submitted to a jury, after which a decree was ordered by the court below, dismissing the petition. From this decree plaintiffs appealed.

E. MCCENY, for plaintiffs.

D. E. LYON, for defendant.

DILLON, J.

The first question which is presented is as to the extent of the grant or privilege which Eiffes gave to the original licensees, Tarter, Linden and Cramer, of whom the plaintiffs claim to be assignees. This license is conceded to have been by parol. The plaintiffs contend that it was an *exclusive privilege*, for an *indefinite time* to mine on *all* of Eiffes' land, except so much as he and his hired man should be mining on. On the contrary, defendants contend that the original licensees were to have, not the right to mine *all the land*, but only upon a certain *east and west range*, called the *old* range, or crevice

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running through Eiffes' land, and to be confined to the walls of it; and that it was to be entirely optional with Eiffes whether, when they were done with this range, he would allow them to work further or not. The testimony on this subject is conflicting. It appears in evidence that in the latter part of 1862 the defendants, Brazier and Buckle, by the parol license of Eiffes, commenced searching for ore, or, in the mining technology of the witnesses, *prospecting*, on another part of Eiffes' land, and finally succeeded in discovering another range or crevice which yielded some five hundred dollars worth of mineral. This range or crevice is located eighty-three feet north of the old range, on which the plaintiffs had worked, but were not working at the time the lode or lead was discovered by the defendants. It is a separate and entirely independent range, and was unknown to the plaintiffs, and to every one, until it was found, discovered, by Brazier and Buckle. The following special questions of fact were submitted to the jury: *First:* "Did Eiffes lease to Tarter, Linden and Cramer all the land described in the petition?" Answer, "No." *Second:* "Were not Tarter, Linden and Cramer *confined* to a certain crevice on Eiffes farm by terms of their mining lease?" Answer, "Yes, until the old one was worked out." *Third:* "Have defendants entered upon the crevice or land leased by Eiffes to Tarter, Linden and Cramer?" Answer, "No." *Fourth:* "Did Brazier obtain a mining lease from Eiffes?" Answer, "Yes." *Fifth:* "Is not the crevice struck up by Brazier a new and distinct one from the old crevice which Tarter, Linden and Cramer leased of Eiffes?" Answer, "Yes."

These findings, if they stand as being warranted by the testimony, are decisive of the case against the plaintiffs. They seem to accord with the probabilities of the transaction, as well as with the weight of the testimony.

It does not seem probable that Eiffes would give three men an exclusive verbal license, without limit as to *time*, embracing his whole farm, except so far as he and his hired man might wish to work. The defendants' theory is more reasonable, viz., that the original licensees were to have but one range *certain*, and only one at a time. One is as much as these men could well and advantageously work. The men employed did

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not work constantly, or exceed two or three in number. No machinery but the rudest and simplest kind—the spade, pick and windlass—was contemplated or employed. The nature of the subject-matter of the privilege gives plausibility to the defendant's version of the agreement. The privilege did not contemplate "prospecting" for surface deposits, or "float mineral," but that which is found in *crevices* or *ranges*—which are fissures or openings in the rock—and which is "the characteristic form of occurrence in the Dubuque district:" Geology of Iowa, Vol. 1st, part 1st, page 447. We are satisfied that the plaintiffs, conceding for the argument that they stand in the shoes, and are entitled to all of the rights of the original licensees, were confined to the old range, and to the walls of it, certainly until it was worked out. As there was no proof that it was worked out, and that they had applied for, or sought to find, another range, they have no right to complain that the landowner has seen fit to grant to others the same privilege of prospecting and mining.

This is one answer to the plaintiff's action; another, and a kindred answer is, that if Eiffes granted them the privilege of mining upon his land, this would not, unless clearly expressed, or necessarily implied, be held to be *exclusive*. See, on this subject, *Beatty* v. *Gregory*, 17 Iowa, 109, and authorities there cited, particularly *Lord Mountjoy's Case*, 4 Leon. 147; Godb. 24; *Chetham* v. *Williamson*, 4 East, 469; *Doe* v. *Wood*, 2 B. & Ald. 724.

Another answer is, that as to the new range or crevice discovered by Brazier and Buckle, the plaintiffs' license (admitting it was subsisting, and embraced the whole land), would give them no right to recover for the value of the mineral obtained by others in another range or crevice. It was a simple license, not a lease or transfer of the mineral. They obtained no rights beyond the range or crevice in which they worked, and of which they had actual possession. This, so far as accompanied with actual possession, the landowner could not arbitrarily, at his pleasure, and without notice, revoke, or without cause, forfeit. But as respects another, and undiscovered range or lode, concerning which the plaintiffs had made no expenditure of money or labor, the parol license, not having been executed or acted upon, would be countermand-

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able: *Beatty* v. *Gregory*, *supra*, and cases there cited; *Doe* v. *Wood*, *supra*; *Rerick* v. *Kern*, 2 American L. C. 682 and notes.

These constitute reasons enough for affirming the decree, without considering whether, upon the evidence, the plaintiffs had forfeited or abandoned their right.

Decree affirmed.

DESLOGE EL AL., Defendants in Error, v. PEARCE & WILLOUGHBY, Plaintiffs in Error.

(38 Missouri, 588. Supreme Court, 1866.)

Extent of right created by parol license—Statute of Frauds. A parol license is a privilege to do some particular act upon the land of another, but as a license to mine purports to confer the right to carry away a part of the realty itself, it creates necessarily an interest in lands, is clearly within the Statute of Frauds, and must be in writing—otherwise it is effectual only to create an estate at will.

Revocability. A parol license is essentially terminable by notice.

[1] **Protection to licensee.** A license protects against an action for trespass or for any act done under, or condition caused by, the exercise of the privilege.

Removal of fixtures. The licensee has the right to remove his fixtures and other property of a personal nature.

[2] **Licensee's possession not adverse.** The right to enter and dig for ores is an incorporeal hereditament, and can only be acquired by deed or by an adverse enjoyment for a sufficient length of time to furnish a presumption of a grant; but in all cases, to raise a presumption of a grant, the possession must be adverse, and a licensee paying royalty has no adverse possession.

One month's notice will terminate a tenancy at will.

[1] *Lockhart* v. *Geir*, 54 Wis. 133.

[2] The contention of the defendants in this case was for the right to work, on a royalty, by what can only be called a perpetual license, and the court does not squarely face the contention. In all mineral countries, where ores or coals are found so accessible that they can be most readily worked by small operators, or when the mineral is found in nests requiring frequent prospecting and change of plant from place to place (as in the Missouri, Illinois and Iowa lead districts, Cornwall, Derbyshire, the Carolinas and elsewhere), a custom seems to have grown up, by common consent, about to this effect: that the landowner would allow and even encourage prospecting

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Error to Washington Circuit Court.

This was a suit of ejectment, instituted by plaintiffs as heirs of Firman Desloge, to recover the possession of a piece of ground, about one half of an acre in extent, the orifice or landing place of a shaft known as Pearce & Willoughby's shaft. It also includes a prayer that defendants be restrained from taking out the mineral from the shaft, the plaintiffs, as owners of the land, claiming to be the owners not only of the mine, but of the right to work it. The plaintiffs gave six months' notice to quit before bringing their suit.

Defendants relied upon the general custom of the country which they established to have existed during French and Spanish times, and to have continued down to the present time, whereby a distinction is made in the proprietary title to the fee of the land and the miner's right to dig for mineral. By the custom, any one could go upon lands thrown open to mining and "prospect;" and if successful, could then mine, and was entitled to a certain space of the surface land around the shaft, paying by way of rent to the proprietor of the fee, a certain percentage of the ore, which ore, by a custom grown up since 1849, was left by the miner for the proprietor in the hands of the smelter to whom he sold his ore.

The custom established certain rules whereby the miner was compelled to work the mine with diligence or forfeit his rights, but which need not be mentioned here, inasmuch as the court in its instructions ignored the custom.

The testimony for the defense proved clearly, not only that this custom was general throughout the mining districts, but that

upon his lands; that when ore was found the miner could work it as he pleased, paying ten per cent. or such other share as the custom fixed to the landlord, the miner claiming and receiving the exclusive right to work, as a reward for his discovering the before unknown possessions of the landlord. This custom is eminently equitable, but somewhat inconsistent, apparently, with our fixed laws concerning realty and the Statute of Frauds. Every now and then, as in the case, is found a landlord who, seeing his tenant making a profit, asserts the Statute of Frauds after having yielded to the custom for many years. Tin bounding in Cornwall is an illustration of the custom. For cases sustaining this note see *Rogers* v. *Brenton*, 10 Q. B. 26; *Irimey* v. *Stocker*, L. R., 1 Ch. App. 396; *Upton* v. *Brazier*, 9 M. R. 243; *Lunsford* v. *La Motte Co.*, 9 M. R. 308; *Lockwood* v. *Lunsford*, 7 M. R. 532; *Alderson* v. *Ennor*, 8 M. R. 526; *Allen* v. *Barkley*, 1 Sp. Eq., 64; *Post* TENANT IN COMMON.

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defendant Pearce, as early as 1835, commenced these mines and had continued them up to the institution of the suit, the defendant Willoughby having been associated with him since 1842; that during all this period the custom had been observed between the defendants, of the one part, and Firman Desloge, ancestor of the plaintiffs; Desloge accepting the rent in ore delivered to the smelters, and refusing to sell his title to the lands except upon the express understanding that he did not sell the miner's right of defendants.

Jones had, previously to the defendants, prospected and mined these same lands, but unsuccessfully.

The court of its own motion gave the following instructions, to which the defendants excepted.

The jury are further instructed that if they believe from the evidence that Firman Desloge, the ancestor of the plaintiffs, gave permission to the defendants to enter upon said tract of land to dig and prospect for mineral, and that the defendants did, by reason of said permission, enter upon said tract of land, and expend large sums of money in prospecting, sinking shafts, etc., then the license so granted is executed, and is not revocable at the will of the grantor or those claiming under him, and the jury will find for the defendants, unless it is proven that the plaintiffs have given three months' notice to the defendants to quit, and offered to pay them all necessary expenses they have incurred in digging of shafts, etc. But they will take into consideration the length of time the defendants have had to work out their claim and the profits made by them from the mineral dug out of the same, and if they find that the profits exceeded the expense, and that the defendants have been rewarded for their labor and risk, then the plaintiffs are not bound to give the notice to quit.

The defendants asked of the court to give the following instructions, to wit:

1. If the jury believe that there was no special arrangement between the ancestor of the plaintiffs and the defendants, for the payment of the rent on the mineral raised, through the smelter at Perry's furnace or other purchasers of the mineral, but that they should find that such was the custom, and that the defendants did, after the death of the plaintiffs' ancestor, cause the rents due on all the mineral raised on the land in question

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to be so returned, with directions for the same to be paid to those entitled, then plaintiffs can not recover for rents in this action.

2. The jury are instructed that the extent as to quantity and duration in point of time of a miner's right, in the absence of any special arrangement between the miner and the proprietor, is a matter to be determined and regulated by the custom prevailing in that behalf in the particular locality where the right attaches; and when it appears that such right has attached with the consent of the proprietor, then it continues and is obligatory upon all persons claiming under such proprietor until forfeited or otherwise determined by the act or consent of the miner; and if the jury find that such right existed in the defendants at the time of the commencement of this action, then the plaintiffs can not recover, and they will find for the defendants.

3. If the jury believe that the ancestor of the plaintiffs made arrangements with the defendants for the rents due on the mineral raised on his land by defendants, to be retained in the hands of the smelter, at the Perry furnace, and that the defendants complied with that arrangement, after the death of plaintiffs' ancestor, up to the bringing of this suit, then they can not recover for rents in this action.

Which instructions the court refused to give, to which refusal the defendants excepted.

The jury having found a verdict for the plaintiffs, defendants moved for a new trial for the errors of the court in the instructions given and refused.

GARESCHE & MEAD, for plaintiffs in error.

I. Simply as a question of tenancy, and without reference to the custom, the case should be reversed. For "a general letting without any limitation as to time, although the payment of the rent be quarterly or monthly, is in construction of law, a letting from year to year." A tenancy at will must be created by express contract, for if the terms are indefinite it will be a tenancy from year to year. In the absence of proof, the legal presumption remains that the tenancy is a yearly one: *Ridgeley* v. *Stillwell*, 25 Mo. 571, and cases there cited; Tayl., Land. and Ten. p. 35, § 59 and 60.

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To terminate the tenancy, a notice should have been given of not less than three months next before the end of the year: R. C. 1865, p. 739, § 12; R. C. 1865, p. 1012, § 12.

A notice is insufficient if not given at least three months prior to the period of the year at which the tenancy commenced: Tayl., Land. & Ten. p. 310, § 475.

The proof was that notice was given six months before the suit was brought, and the sixth instruction for the plaintiffs is therefore evidently erroneous.

II. The custom, limiting as it did the miner's right to "surface land," imposing upon him a percentage of the ore as a toll to the proprietor, and requiring the diligent working of the mine, was reasonable. It is a common occurrence in mining districts for the ownership of the land to be vested in one person, and the ownership of the mines in another.

"In all freehold lands, an adverse claim to the mineral" must be distinctly established against the owner of the surface. This may be effected by documentary evidence; or, in the absence of documentary evidence, or in opposition to such evidence, a title to them may be made out by proofs of acts of ownership and length of possession: Bainb. on Mines, p. 5; *Stewart* v. *Chadwick*, 8 Iowa, 463.

By custom, a title can be acquired to mines: 74 Law Lib., Coll. on Mines, p. 21, § 17; Bainb. on Mines, 28.

In *Curtis* v. *Daniel*, 10 East, 273, Lord Ellenborough says:

"Why there may not be two customs, one for the lord of the manor to have tin, and another for these tenants to have the copper under their estates, and waste in question." "The usage which establishes the right of the lord will also that of the tenant; and here has been an adverse possession of the copper mines by these tenants for above twenty years past."

In *Barnes* v. *Mawson*, 1 Maule & Sel. 77, by Lord Ellenborough: "That one may have a freehold title to the land, and another the exclusive right of the mines in it, and that he could show by evidence of general reputation, as well as acts of taking coal under the lands of other freeholders within the same boundary, that the right to the coal was in the lord."

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A custom like that upheld by appellants exists in Cornwall, and was good: *Rogers* v. *Brenton*, 10 Q. B. 26; Coll. on Mines, pp. 22–41; Bainb., Mines, pp. 456 and 468; *McGarrity* v. *Byington*, 12 Cal. 427.

III. No evidence being offered for the particular demise to defendants, recourse must be had to the custom to define it.

Every demise between landlord and tenant, in respect to matters in which the parties are silent, may be fairly open to explanation, by the general usage of the country, or the district where the land lies. Every person, under such circumstances, is supposed to be cognizant of this custom, and to contract with a tacit reference to it. Hence a tenant could remove valuable buildings: *Van Ness* v. *Pacard*, 2 Pet. 148; *Keagh* v. *Daniel*, 12 Wis. 163.

Local custom is admitted to explain the termination of a written lease: *Wilcox* v. *Wood*, 9 Wend. 349; (parol lease), *Moore* v. *Eason*, 11 Ired. 568; so in case of a written lease, custom may be shown that the tenant is entitled to the way-going crop: *Stultz* v. *Dickey*, 5 Binn. 285; also *Foster* v. v. *Robinson*, 6 Ohio (N. S.), 95, and cases quoted; *Templeman* v. *Biddle*, 1 Harr. 522; or to be paid for his labor, on the land: *Womersley* v. *Dally*, 40 Eng. L. & Eq. 488.

Parties are always presumed to contract with reference to a general custom or usage: *Barton* v. *McKelway*, 22 N. J. L. 175; *Souter* v. *Kellermon*, 18 Mo. 509; *Martin* v. *Hall*, 26 Mo. 386; and where hiring was general, term fixed by the custom: *Gleason* v. *Walsh*, 43 Me. 397.

Mining claims are held by possession, but that possession is defined by usage, and local and conventional rules: *Attwood* v. *Fricot*, 17 Cal. 43.

Such a custom is not within the Statute of Frauds, because no divestiture of title, but a mere occupancy and user of the ground: *Gore* v. *McBrayer*, 18 Cal. 589; *Table Mt. Tunnel Co.* v. *Stranahan*, 20 Cal. 208; and that the license is not revocable: *Gillett* v. *Treganza*, 6 Wis. 343.

IV. Immemorial time is the term prescribed by the Statute of Limitations: 1 Greenl. Ev. § 17, and note 1 in margin. In this State, ten years.

V. After an user, as in this case, of over ten years (from 1835 to 1859, twenty-four years), the jury were at liberty to presume a grant.

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The term for a prescription, or prescriptive grant, is the local period of limitation for quieting titles: 3 Crui. Dig. 217, n. 1, and 485, n. 43; 2 Greenl. Ev., §§ 538–9 and 546; *Biddle* v. *Mellon*, 13 Mo. 335.

A person has no right to diminish, or to obstruct the flow of a stream "without a grant, or an uninterrupted enjoyment of twenty years, which is evidence of it:" 3 Kent's Com. 439; Ibid. of Easem. 441–2; *McCalmont* v. *Whittaker*, 3 Rawle, 90; *McBee* v. *Loftis*, 3 Strob. Eq. 94.

A writing granting not the soil in fee, but the use only for the purpose of mining, is not a deed for the conveyance of land: *Stein* v. *Burden*, 24 Ala. 148; *Miller* v. *Garlock*, 8 Barb. 154; *Tyler* v. *Wilkinson*, 4 Mas. 402; *Gleason* v. *Tuttle*, 46 Me. 288; *Win. Lake Co.* v. *Young*, 40 N. H. 435; *Ray* v. *Fletcher*, 12 Cush. 200; *Jones* v. *Crow*, 32 Pa. St. 398; *Carlyon* v. *Lovering*, 40 Eng. L. & E. 448; *Race* v. *Ward*, 7 Ellis & Black. 382; *Murgatroyd* v. *Robinson*, Id. 391.

Or even of a right to land on another's shore to dry nets: *Gray* v. *Bond*, 2 Brod. & Bing. 667.

That after fifteen years (term of limitation), it would not be revocable: *Arbuckle* v. *Ward*, 29 Vt. 43.

A grant may be presumed even in the case of a statutory requirement that it should be a written record: *Durham* v. *Durham*, 26 Mo. 507; *Miller* v. *Reigne*, 2 Hill (S. C.), 592; or even of an act of the legislature, when not derogatory to the policy of the State: *Vinyard* v. *Passalaique*, 2 Strobh. 536; *Lewis* v. *Haite*, 33 Mo. 535.

VI. "Adverse" means only "by color of right." See cases above cited, and *Miller* v. *Garlock*, 8 Barb. 154. Nor does the payment of toll make it *less* "adverse:" Bainb. on Mines, 35.

DRYDEN & LINDLEY, for defendants in error.

I. The right claimed by the defendants is an interest in the land, or it is an easement.

Whether it be an interest or easement, for the purpose of this case is unimportant.

"It seems to be settled that the right to enter and remain

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on another's land for a certain time, or indefinitely, at the pleasure of the party claiming the privilege, is an interest in the land:" *Fuhr* v. *Dean*, 26 Mo. 120.

The right claimed by the defendants was the right to enter upon the land in controversy, and to occupy and possess the same, and to dig and take therefrom the mineral therein permanently, or for a period of time entirely indefinite, depending wholly upon their will and pleasure, they rendering and paying rent, etc.

II. The right claimed by the defendants being an easement, or an interest in the land, can be created only by writing: *Fuhr* v. *Dean*, 26 Mo. 119; *Arnold* v. *Stevens*, 24 Pick. 109.

There is no pretense that the privilege claimed by the defendants here was created by writing; on the contrary, the origin and existence in parol are expressly avowed.

III. The right claimed by the defendants being an easement, or an interest in the land, created by parol and not put in writing, is an estate at will only: 1 Stat. of Frauds, R. C. 1855, p. 806.

IV. But to obviate the objection that the defendants' interest was created by parol only, and to enlarge their estate, the defendants rely upon what they call "the miner custom," by which they claim the privilege of holding the plaintiff's land, and digging and removing the mineral therefrom, for a period of time indefinite, depending wholly upon their free will and pleasure.

We reply, the alleged custom is *illegal*, and therefore insufficient to justify the defendants' possession after notice to quit.

A necessary requisite to the goodness of a particular custom, says Sir Wm. Blackstone (1 Bl. Com. 76), is, 1, "That it has been used so long that the memory of man runneth not to the contrary; so that if any one can show the beginning of it, it is no good custom. For which reason no custom can prevail against an express act of Parliament, since the statute itself is a proof of a time when such a custom did not exist."

"To take a case out of the operation of a general principle, a usage should have every requisite to give it validity. It must be ancient, certain, uniform and reasonable. And al-

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though a usage is often resorted to for explanation of commercial instruments, it never is nor ought to be received to contradict a settled rule of commercial law." 3 Watts, 179.

Note 21, p. 79, book 1, Sharsw. Bl. Com., Judge Sharswood says: "In some of the States, as in Pennsylvania, for instance, general customs and usage on certain subjects prevailed to such an extent as to produce a distinctive common law. In very few of the States, however, do any mere local customs exist, such as are treated of by the commentator in this section; they, however, are to be carefully distinguished from usages of trade or business. These are everywhere allowed their just influence and operation.

A usage of trade and business clearly proved to exist, to be ancient, notorious and reasonable, and consistent with law, is permitted to explain the meaning of ambiguous words in written contracts, and to control the mode and extent of their rights where the parties have been silent; but it is never admitted against the expressed agreement of the parties, nor in violation of any statute or well established rule of law. Perhaps in some cases the courts have gone further than is here indicated, but the current of judicial decisions of late years has been to restrain and limit the allowance and influence of special usages.

The custom relied upon by the defendants is in the teeth of the Statute of Frauds and perjuries. No custom can be sustained in opposition to the established rules of law: *Frith* v. *Barker*, 2 John. 335.

"The usage of no class of citizens can be sustained in opposition to the principles of law." *Homer* v. *Dorr*, 10 Mass. 29.

V. The defendants being in as tenants at will of the plaintiffs, it was competent for the plaintiffs to put an end to the tenancy by one month's notice to quit: Land. & Ten., § 13, p. 1012, R. C. 1855. (Plaintiffs gave six months' notice to quit.)

VI. The instruction given by the court of its own motion, and excepted to by the defendants, was more favorable to the defendants than their case justifies, and they have therefore no right to complain of the action of the court in giving it.

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That branch of the instruction which made the plaintiffs' right to recover to depend upon whether the defendants had been reimbursed, their expenses, labor and risk in working the mines, was the imposition of a condition which the law did not warrant. If the defendants entered as supposed by the instruction—and that they did is admitted by the pleadings, and the plaintiffs gave the notice supposed to quit—the plaintiffs were entitled to recover without regard to the other conditions of the instruction.

VII. The second instruction asked by the defendants and refused by the court was bad, in that it assumes that a local custom will override the law of the land.

HOLMES, judge, delivered the opinion of the court.

This was an action of ejectment for the possession of land in which the defendants were working a lead mine. The answer denies the plaintiffs' right to the possession, or to damages. It alleges by way of defense first, a grant from the ancestor of the plaintiffs to one of the defendants, in 1835, for mining lead ore, with authority to sink shafts and raise mineral, and with the privilege of taking the same to his own use, paying to the grantor one tenth of the lead or ore, and that afterward the other defendant became a joint owner in the grant; and that they had enjoyed the possession and privilege and worked the mines for more than twenty years, and expended large sums of money.

And second, a license from the ancestor of the plaintiffs to the like effect; and third, a right to hold the premises and continue their mining operations by the custom of miners, existing in the region of the lead mines of Missouri as far back as the year 1720, and the nature and particulars of the custom are fully set forth; and that they have worked said mines and paid the customary one tenth to the ancestor of the plaintiffs, and to his administrators after his decease, from the beginning of successful operations down to the present time.

They allege further that they had sunk a shaft to the depth of one hundred and twenty feet, and made drifts some two or three hundred feet in length, and erected whims and fixtures at a considerable expense of labor and money; and they claim

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the right by virtue of said grant, license, or custom, to remain in possession and continue working the mines as heretofore; and pray for judgment, if ejected, for the value of the work done and for the present value of the mine.

The evidence failed to show any grant, and tended to prove that the defendants entered and commenced working the mines under a mere parol license or verbal privilege, paying the license or one tenth of the ore raised, and that they had continued their operations under this privilege to the present time. The existence of a custom among miners, extending back to Spanish times, to appropriate mining claims on unoccupied lands, and work the same on similar terms, was fully proved; but the evidence failed to show any existing right by custom (or otherwise than by virtue of the parol license) extending beyond the period of the Statute of Limitations.

It appeared from the evidence that the defendants had been working this mine for more than ten years next before the commencement of this suit, under the license or privilege from the plaintiffs and their ancestor, paying them the one tenth of the ores or lead raised. There was no proof of any adverse claim or possession under any supposed grant by deed or under any immemorial custom, other than the right and possession held under the license; and it was proved that the plaintiffs had given them six months' notice to quit and remove.

Instructions were given for the plaintiffs as to their right to recover upon the notice to quit, and as to damages. In one of these instructions the jury were told that they might take into consideration the length of time the defendants had had to work out their claim, and the profits made by them; and that if they found that the defendants had been rewarded for their labor and risk, the plaintiffs were only bound to give them notice to quit.

Instruction for the defendants in relation to the recovery of rents under the license as damages, and upon the effect of the custom of miners as a foundation of right in the defendants, were refused. This instruction was as follows:

"2. The jury are instructed that the extent as to quantit and duration, in point of time, of a miner's right, in the absence of any special arrangement between the miner and the

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proprietor, is a matter to be determined and regulated by the custom prevailing in that behalf in the particular locality where the right attaches; and when it appears that such right has attached with the consent of the proprietor, then it continues and is obligatory upon all persons claiming under such proprietor until forfeited, or otherwise determined by the act or consent of the miner; and if the jury find that such right existed in the defendants at the time of the commencement of this action, then the plaintiffs can not recover, and they will find for the defendants."

A parol license, or mere verbal privilege, carries no interest in land, and is a mere authority or privilege to do some particular acts upon the land of another: *Fuhr* v. *Dean*, 26 Mo. 116; *Wolfe* v. *Frost*, 4 Sandf. Ch. 72; *Cook* v. *Stearns*, 11 Mass. 533; *Wood* v. *Leadbitter*, 13 Mees. & W. 838; 3 Kent's Com. 452; Washb. on Easm. 5. But a license to work mines is quite a different thing; it confers not only a right to enter and occupy, but to commit waste and carry away a part of the realty itself; and it is therefore necessarily an interest in lands, tenements and hereditaments which is clearly within the Statute of Frauds, and must, in order to be effectual to give any permanent inheritable interest itself, or any right to a continued and perpetual possession, be put in writing and signed by the parties, or be given by deed; otherwise it can have no greater force or effect than to create an estate at will only, either at law or in equity: R. C. 1855, p. 806, § 1; *Wolfe* v. *Frost*, 4 Sandf. Ch. 72; Coll. on Mines, 7; Bainb., Mines, 83. A parol license can not be made the foundation of any right or interest in real estate, or to the future continuous possession thereof, nor to a continuation of the privilege beyond the will of the owner of the land. It is essentially countermandable and revocable at will: *Cook* v. *Stearns*, 11 Mass. 533; 4 Sandf. 72; Washb. on Easm., 19; 2 Am. Lead. Cases (3d Ed.), 701.

Even if such an arrangement could be considered as creating a tenancy at will or by sufferance, it might be terminated, under the statute, by giving one month's notice to remove: R. C. 1855, page 1012, § 13. Six months' notice was given in this case, though without reference to the end of a year. There may be a tenancy at will by the year or by the month, but such tenancy must be created by express contract: *Ridgeley* v. *Stillwell*, 25 Mo. 570. There was no evidence in this

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case, on which the idea of a leasing for any given term, or a tenancy by the year or by the month, can be founded. This arrangement could have no other effect than to create an estate at will generally, without regard to any holding by the year.

Such a license, so far as executed, would protect the defendants against an action of trespass as wrongdoers and against damages for what had been done under the privilege given, and against damages for not restoring or replacing what had been changed or altered under the privilege: *Pierpont* v. *Barnard*, 2 Seld. 279; *Sampson* v. *Burnside*, 13 N. H. 264; *Liggins* v. *Inge*, 7 Bing. 682; 2 Am. Lea. Ca. 697-699, 3d Ed. In many cases it is held that where a party has, under a parol license, placed his own property on the lands of another for certain specific purposes, as mill dams, aqueducts, bridges, houses, fixtures or other things which, without some special agreement, might become a fixed part of the realty, he will be protected against an action of trespass for continuing them or for removing them, and may maintain an action against the owner, who gives the license, for interfering with them in violation of the privilege given. These cases seem to proceed on the ground that these things, which are thus placed on the lands, are to be treated, under the special agreement, as personal property of the licensee, or on the ground of an estoppel *in pais*. Under these authorities we are inclined to think that the defendants would have a right to remove, at pleasure, their whims, fixtures or other property of a personal nature, under the terms of the understanding, or by force of any custom or local usage proved to have existed there in relation to such matters, and with reference to which the parties might be presumed to have contracted. But a mere license, unaccompanied with any vested interest in the real estate, created by deed or other writing, and independent of any title acquired by grant, prescription, or adverse possession and claim for the period of the Statute of Limitations, must be deemed to be in its own nature countermandable and essentially revocable at the will of the owners of the fee. It can give no irrevocable right to hold possession of the realty and to continue working the mines indefinitely and against the will of the owner of the land: 2 Amer. Lea. Ca. (3d Ed.) 701; *Wood* v. *Leadbitter*, 13 Mees. & W. 838; *Wolfe* v. *Frost*, 4 Sandf. Ch. 72.

The defendants' instruction in relation to the custom of

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miners as a foundation of a right to retain possession and continue working the mines in accordance with such custom or agreeably to the terms of the privilege, was properly refused. How far these local mining customs may have force, when proved to exist, in matters of contract arising among miners, or between them and the owners of the land when they have acquired some right or interest in the mines, by deed or other writing, not declared void by the Statute of Frauds, or by any other mode of acquiring title to the possession of real estate, or where, as in California, mining claims are founded upon a prior actual possession merely as the better title, in respect of the construction of contracts which may have been made with reference to such customs, it is unnecessary here to inquire.

The custom is not invoked here for aid in interpreting the contracts and agreements of the parties, but as a source and foundation of an absolute right and interest in real estate. Something like a prescription or custom from the time of legal memory, supposed to have commenced with a *bounding off* of mining claims on waste and unoccupied lands, paying a toll of the ores dug to the owner of the land, and continuing for a period extending back beyond the memory of living witnesses, or beyond the period of the Statute of Limitations, seems to have existed in the mining districts in England. In *Barnes* v. *Mawson*, 1 Maule & S. 77, a tenant of the freehold claimed the mines against the lord of the manor, who relied upon a reservation established, not by documentary evidence, but by acts of ownership and adverse enjoyment as far back as the memory of living witnesses would reach, and the matter was left to the jury on the question of adverse enjoyment and acts of ownership for time immemorial. So in *Curtis* v. *Daniel*, 5 East, 273, the right of the tenant of the freehold, as against the lord of the manor, to have the dues of copper mines under the land, was made to depend upon acts of ownership and adverse possession of the mines and dues for more than twenty years. In *Rogers* v. *Brenton*, 10 Q. B. 26, the plaintiff claimed the mine as a "bounder," under the custom of miners, as against other "bounders," showing no title in the premises.

The custom of *bounding* on waste mineral lands was so far recognized as to be allowed as the foundation of a claim, qualified by the condition of continuous working, as against

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another showing no better title, but that the right ceased when the bounder ceased to work. There would seem to be nothing in these cases which can be invoked in support of the doctrine that a bounder of mines, under the custom, can acquire any right or title, corporeal or incorporeal, in a mine, as against the true owner of the land, by any possession, enjoyment or acts of ownership, which are not adverse in character and continued beyond the period of the Statute of Limitations. The right to enter and dig for ores is an incorporeal hereditament, and can only be acquired by deed or by adverse enjoyment for a sufficient length of time to furnish a foundation for a presumption of a grant, but, in all cases, the possession, in order to raise even the slightest presumption, must be *adverse: Arnold* v. *Stevens,* 24 Pick. 106; Bainbridge on Mines, 35.

Here, then, is no evidence of any adverse possession or engagement. The evidence shows that the defendants have held the premises by the license and permission of the plaintiffs and their ancestor, and have always recognized their superior title by paying the customary one tenth of the ores raised.

The plaintiffs sue in ejectment for the possession of the premises, and for damages for the detention thereof since the notice to quit was given. The privilege or license being in its own nature revocable at will, was revoked and terminated by the giving of the notice to remove. Neither the custom proved, nor the long possession under the license, can be any bar to a recovery in this action. It does not appear that the plaintiffs have recovered any other or more damages than they were entitled to recover.

The question whether the defendants had worked the mine long enough to reward them for their labor and expenditure, was immaterial.

There was no material error in the ruling of the court upon the instructions.

Judgment affirmed.

The others judges concur.

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ANDERSON ET AL. V. SIMPSON ET AL.

(21 Iowa, 399. Supreme Court, 1866.)

[1] **License, with possession, not within the Statute of Frauds.** A parol license to mine, under which possession has been taken, and which license is established by the evidence of the licensor himself, is not within the Statute of Frauds.

Idem—License, without possession. But a license not followed by possession taken under it is within the Statute.

Appeal from Dubuque District Court. Tuesday, December 11th.

This is a suit in equity, to enjoin the defendants from mining lead ore upon certain premises known as the North part of mineral lot number thirty-one, in Dubuque county, and to settle and determine the plaintiffs' right to mine thereon. A temporary injunction was granted on the filing of the petition. The testimony was all taken in writing, and the cause tried as by the first method of trying equitable issues; but on motion of defendants certain issues were submitted to a jury. The first jury disagreed, and were discharged. The second jury returned a verdict as follows:

1 Q. Did the plaintiffs ever lease the premises in the petition described, from George Wilde, for mining purposes? If so, at what time?

A. Yea; in the year 1853.

2 Q. Was such lease to plaintiffs from George Wilde in force when defendants commenced work on said premises?

A. We, the jury, say no.

3 Q. Did the defendants lease from George Wilde the mineral lands described in the plaintiffs' petition? If yea, when?

A. Yes; in the year 1863.

4 Q. At the time of the lease to the defendants, had they notice that the plaintiffs claimed the right to the possession of the land, described in the petition, for mining purposes?

A. No.

5 Q. Who was entitled to the possession of the land

[1] *Southmayd* v. *Southmayd*, 4 Mont, 101.

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described in the petition, for mining purposes, at the time of the commencement of this action?

A. The defendants.

A motion was made to set aside the verdict of the jury, which motion was sustained, and a decree rendered for the plaintiffs, as prayed for in the petition, and the defendants appeal.

H. T. MCNULTY, for the appellants.

BISSEL & SHIRAS, for the appellees.

COLE, J.

The finding of the jury has, in such cases as this, properly triable by the first method for the trial of equitable issues, no binding legal effect upon the determination of the case by the court; but the court may accept or reject the finding and render such judgment as he considers equitable: Revision, § 2999.

The evidence covers four hundred and fifteen pages of manuscript, and has received a careful first and second reading. Without taking the space requisite to a detailed statement of the facts and circumstances proved in the case, or the process of reasoning whereby we come to the ultimate conclusion arrived at, we proceed to state two or three of the leading bases whereon that conclusion rests.

It is established beyond dispute that the plaintiffs, at one time, and in 1851 or 1852, obtained a parol license to dig for and remove mineral from the premises in controversy; that they took possession of the premises under the license or contract and continued their prospecting and mining operations thereon, and on the lots adjoining, for the purpose of "proving" this, for several years. These facts are testified to by the owner of the fee or license, as well as by other witnesses. This license, or right to mine, although it rested wholly in parol, became a valid and binding contract by virtue of the possession, with the actual consent of the licensor, taken and held under it; and its validity, as well as its manner of proof, is exempted from the application of the Statute of Frauds by reason of this fact, as well as the fact that the contract itself is proved by the testimony of the licensor or landlord himself

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when called as a witness: Revision, §§ 4007, 4010; *Beatty* v. *Gregory*, 17 Iowa, 109.

These plaintiffs, however, ceased to work under their license. The time during which they suspended operations is variously stated from two to five years. The licensor and the plaintiffs, however, agree in their testimony, that at the time work was suspended it was expressly understood and agreed between them that there should be no forfeiture of the license by reason of the failure to work under it, but that the same should continue in force.

This agreement was made in consideration of the large expenditure of money by the plaintiffs in "proving" the ground and the very limited amount of mineral secured thereby. But it was also understood and agreed that if the licensor should, at any time after that, desire the plaintiffs to renew their working under the license, he should give them notice thereof; and then a failure on their part to go to work should effect a forfeiture of their license. Such notice was given a short time prior to the commencement of this suit, and the plaintiffs complied with the same by renewing their mining operations on the premises.

The plaintiffs, therefore, have established their right to the premises as against the licensor and every other person, unless it shall be as to those who may have acquired a right or license without notice of the plaintiffs' rights. The defendants claim that they did acquire such right in ignorance of the plaintiffs' claim, and while the plaintiffs were not in such possession of their claim as to afford the defendants even constructive notice.

This is an affirmative defense, and the defendants have the burden of its establishment.

That they had no notice, either actual or constructive, of the plaintiffs' claim, is very satisfactorily established. On the question of their right or license to mine on the premises in dispute, they have failed in the proof. The defendants themselves testify as to the fact of parol license obtained from the owner and agent, as claimed by them in their defense. And if this was the only testimony, this fact might be regarded as established. But they claim to have acquired their license by reason of having first made an arrangement with a previous licensee; and that upon representing to the owner that they had made such an arrangement, he assented thereto and agreed

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that they should mine on the lot. This previous licensee, under whom and whose license they claim, was also called and testified as a witness; and he swears that his and his associates' license was to mine on an east and west crevice from a shaft south of the premises in dispute, but on the same lot, and that he and his associates had no right to mine as far north on the lot as the premises or *locus* in controversy. The landlord, or person from whom the license is, claimed, to have been obtained, is also examined as a witness, and he testifies positively, that he never did license the defendants to mine on the north part of the lot. He also corroborates the testimony of the licensee, under whose license the defendants acquired the leave to enter as claimed by them. In view of all the testimony on this point, it is very safe to conclude that the defendants have not established affirmatively the fact that they had a license to mine on that particular part of lot number thirty-one, which constitutes the premises in controversy.

We are not unmindful of the fact that there are more or less contradictions or improbabilities in portions of the testimony of the landlord; but they do not go to impair his credibility to any considerable extent as to the essential fact we are considering, upon which he is entirely consistent. Nor are the discrepancies in his own testimony or the contradictions by other witnesses, other than the defendants themselves, of such a character as to discredit him as a witness, or to justify any serious imputations as to his honesty or truthfulness.

When it is remembered that the premises upon which the defendants have a right to mine are on a part of the same lot as the premises in controversy, and that the shaft through which they were to and did enter was situated quite a distance east from the entire lot and on the premises of another person, and that the crevice was supposed to run nearly or quite due east and west, which would take them upon that part of the lot on which they had a right to mine, and also the further fact that the real course of the crevice was northwest and was unknown to any one until the actual survey, made only a short time before this controversy arose, and when also the further fact is remembered that these mining rights are often, if not generally, granted in an indefintie and loose manner, it is not at all difficult to solve the apparent

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conflicts in the testimony, or to determine where the very right rests, consistent with the integrity of the witnesses and the good faith of the parties.

But there is still one other matter of controlling influence in the conclusion adverse to defendants. It is this: The defendants claim under a parol license. This license is denied by the pleadings and by the alleged licensor, when called as a witness in the case. In order to make the parol license valid, and exempt it from the operation of the Statute of Frauds, it is necessary to show a possession taken and held under it, and this the defendants have failed. The entry through the shaft on the adjoining lot was as consistent with possession of the south half of lot thirty-one as with the part in controversy. In other words, the possession acquired by the defendants, of the premises in controversy, was not traceable directly to the parol contract as claimed by them, nor necessarily under it. But, on the contrary, their possession was directly attributable to the unexpected course of the crevice and was in no just sense with the "actual or implied consent of the licensor;" and their right to the possession was denied with promptness as soon as brought to the knowledge of the adverse parties. The rule is well settled that possession, in order to be available under the statute, must be ostensibly and actually taken under, and by virtue of, the parol contract.

Without pursuing the discussion further than simply to indicate, as we have, some of the leading features determining us to one conclusion, we must order that the judgment of the district court stand

Affirmed.

DILLON, J., *dissenting.* Convinced that the finding of the jury is consistent with the weight of reliable evidence, and works the more equitable result, I am constrained most respectfully to dissent from the opinion just read. I do not propose to discuss the testimony in detail. This is not a contest between licensees and the owner of the land, but between two sets of licensees. The plaintiffs seek affirmative relief, and to obtain it must show affirmatively their right to it. They must rely upon the strength of their own, and not upon the weakness of the defendants' right.

Now, the jury found from the evidence that the plaintiffs'

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lease or license *was not in force* when the defendants commenced to work upon the premises. If this is so, then their bill ought, without further inquiry, to be dismissed.

In reference to a question of this character, viz., whether the evidence did not show an abandonment by the plaintiffs of their right to mine, the finding of the jury, especially a jury of the vicinage familiar with mining usages and customs, ought to be regarded as entitled to peculiar weight. And the finding was, I am satisfied, well warranted by the evidence and circumstances. The plaintiffs' alleged license dated as far back as 1852 or 1853. Defendants did not commence mining until 1863. For quite or near five years prior to this time the plaintiffs had not struck a stroke or expended a dollar in mining upon the land of Wilde. The shafts which they had previously sunk had all been filled up. It is admitted that defendants had no notice of plaintiffs' alleged rights. It was only when the defendants, after great labor and expense, had struck a valuable mineral deposit, that the plaintiffs, by the assistance and collusion of Wilde, the licensor, and who was entitled to a *greater rent* under the license to the plaintiffs than under that to the defendants, set on foot and sought to re-animate their defunct and long abandoned claim, to reap the fruit of the toil and good fortune of the defendants. To this scheme, Wilde, having a direct pecuniary motive, lends his active assistance. His testimony, upon which the plaintiffs largely rely, and his conduct toward the defendants, impress me most unfavorably. I must be pardoned if I do not feel it safe to follow where he is the guide. The miner, by whose toil mineral has been found, should not be deprived of it in favor of claimants whose case is so suspicious as that of the plaintiffs. I confess that my sympathies are with the men by whose labor and money the discovery was made; and they are against those who lie in ambush to surprise the toilsome and fortunate discoverer with dormant and conceded claims.

I am in favor of sustaining the finding of the jury, because it denied the existence of the stale claim or lease of the plaintiffs, and because it secured to the defendants as against the plaintiffs the fruits of their discovery.

The majority opinion founds an argument against the defendants on the ground that their license from Wilde was

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within the Statute of Frauds. This, I think, is wholly immaterial, because, as before observed, the plaintiffs must rely upon their own title, and right and because they can not set up for Wilde (who is not a party), as against the defendants, the Statute of Frauds.

I am of opinion that the proper decree would have been and is one dismissing the plaintiffs' petition, but as the majority of the court think otherwise, the decree below must stand

Affirmed.

HUFF v. MCCAULEY.

(53 Pennsylvania State, 206. Supreme Court, 1866.)

[1] **Irrevocable license—Estoppel.** The rule that a license to do something on the licensor's land, followed by expenditure on the faith of it, is irrevocable, rests upon the principle of estoppel, because the parties can not be placed *in statu quo*.

Vested rights. Equity treats the license thus executed as a contract giving absolute rights.

Statu quo. Where there has been only a consideration paid, there is nothing in the way of restoring the parties to their original condition.

Consideration not paid. A license is not converted into a contract, giving irrevocable interests in land, by the mere fact that a consideration was agreed to be paid for it.

Profit a prendre. A contract that one may take coal for his works from the land of another, is a right of profit *a prendre*, is incorporeal and incapable of creation except by grant or prescription.

Easement—Grant. An easement can not exist in parol. An interest in land or arising out of it, corporeal or incorporeal, must lie in grant.

Timber—Statute of Frauds. Agreements for the sale of growing timber, not made with a view to immediate severance, are contracts for the sale of interests in land and within the Statute of Frauds.

Error to the Court of Common Pleas of Westmoreland County.

This was an action of trespass by Samuel McCauley against George Huff and others, for breaking and entering his close, etc., and digging and taking away 50,000 bushels of coal of the value of $1,000.

[1] *Wallis* v. *Harrison*, 4 M. & W. 558.

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It was not disputed that coal was digged and taken by the defendants from land of which the plaintiff was the owner. Adjoining the land of the plaintiff, Huff, the defendant, owned a tract of land on which he had salt works. The coal was taken from the plaintiff's land through a drift on Huff's land. The defense was, that there was a parol agreement between McCauley and Huff allowing Huff to take the coal. There was evidence from several witnesses that the plaintiff agreed that if Huff "would let him have coal for the use of his farm, Huff might have coal, as much as he wanted, and as long as he wanted for the use of his works." There was no evidence that the plaintiff had got any coal out of this bank.

By one of his points the plaintiff asked the court to charge:

"That the alleged contract, as sworn to by Carnahan, Whitesell and Sarver, if they are believed by the jury, would create an interest in George Huff in the land of the plaintiff, and that if they find that such is the case, such a contract would be utterly void, and the defendants can not protect themselves under it."

To this the court answered:

"We do not consider that this alleged contract, as proved by these witnesses, creates any interest in the land of McCauley, the plaintiff, but establishes a parol license, revocable merely as such, if revoked before any necessary expenditure made by Huff in pursuance of it. But if expenditure of money was necessary to its enjoyment, and such expenditures were made, then it ceases to be a mere revocable license, and becomes a contract not revocable at the will of the grantor."

The court further charged:

"I view this case, then, if the evidence is believed, as a license to enter and take away the coal. A license is a privilege to go upon the land of another for some purpose, sought for by the grantee as a right of way over his land, or to flood water back upon it, or construct a mill-race through it. It may be a bare license, unaccompanied with any expenditure on the part of the grantee. In such a case it is at any time and at all times revocable. As in this case, if the license had been granted, and before any expenditure upon the faith of the grant by Huff, McCauley had revoked it, the privilege would have ceased."

There was a verdict for the plaintiff for $34.

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The foregoing instructions of the court were assigned for error.

H. D. FOSTER, for plaintiffs in error, cited 8 Metc. 34; *Claflin* v. *Carpenter*, 4 Id. 583; *Wood* v. *Manley*, 11 Ad. & E. 34; *Rerick* v. *Kern*, 14 S. & R. 267; *Swartz* v. *Swartz*, 4 Barr, 357; 1 Metc. 316.

MARCHAND & LAIRD, for defendant in error, cited Addison on Cont. 31; *Crosby* v. *Wadsworth*, 6 East, 610; *Backenstoss* v. *Stahler*, 9 Casey, 251; *Yeakle* v. *Jacob*, Id. 376; *Washabaugh* v. *Entriken*, 12 Id. 513; *Woods* v. *Wilson*, 1 Wright, 384; *Cook* v. *Stearns*, 11 Mass. 533.

The opinion of the court was delivered, November 8, 1866, by STRONG, J.

In the court below the defendants relied for their defense upon an arrangement alleged by them to have been made between the plaintiff, McCauley, and George Huff, by which the latter was authorized to take as much coal from McCauley's land as he wanted for the use of his salt works, and to take it as long as he wished, in consideration of his agreement that McCauley might use his drift and scaffold to take out coal for himself. Under the instructions given to the jury, they must have found either that no such arrangement had been made, or that if it had, Huff had made no expenditure upon the faith of it. To which of these conclusions they came it is impossible to tell. If there had been no such arrangement made, what the court declared would have been its legal effect, if made, is of no importance. The jury may, however, have found that the parties had entered into such mutual agreements, but that Huff had made no expenditure of money in reliance upon them, and hence that he was not in a condition to set up an estoppel *in pais* against the plaintiff. It becomes necessary, therefore, to consider whether the defendants were injured by the instruction given to the jury, respecting the rights of the parties to such an arrangement. It was a case of verbal agreement, and the charge of the court was, in effect, that if made it was a revocable license and no more. In this it is insisted there was error, and it is argued that there having been a consideration given for the privilege accorded to

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Huff, in the allowance to McCauley to use Huff's drift and scaffold, that which otherwise might have been only a license became an irrevocable contract. It is manifest that if Huff took anything under the agreement, it must have been a license, or an easement, or an interest in land, or an incorporeal right arising out of it. It is observable that the case is unlike that class in which it has been held by the courts of this State that a license to do something on the licensor's land, when followed by the expenditure of money on the faith of it, is irrevocable, and is to be treated as a binding contract. Of this class *LeFevre* v. *LeFevre*, 4 S. & R. 241, is the leading case. It was followed by *Rerick* v. *Kern*, 14 S. & R. 267; by *Swartz* v. *Swartz*, 4 Barr, 353; by *Ebner* v. *Stichter*, 7 Harris, 19, and perhaps by others. All these decisions rest upon the principle of estoppel. The parties can not be placed *in statu quo* after the license has been executed and work done, or money expended on the faith of it, and hence such a case is regarded as presenting a sufficient reason for a chancellor's interference to restrain any action of the licensor which would deprive the licensee of the benefit of the expenditure he was encouraged to make by the very party who seeks to make it fruitless. Equity treats the license thus executed as a contract giving absolute rights, and protects the licensee in the enjoyment of them. In doing so, however, the courts of this State have gone beyond the common law, and beyond the rulings of courts of equity elsewhere. But where there has not been expenditure on the faith of a license, as in the present case, there is no foundation for an estoppel, and the same reason does not exist for holding it irrevocable. Even if there has been a consideration paid, there is nothing in the way of restoring the parties to their original condition. No case in this State has gone to the length of ruling that it is converted into a contract, giving irrevocable interests in or out of lands, by the mere fact that a consideration was agreed to be paid or allowed for it. Such was not either of the cases that have been cited. In all of them something had been done in reliance upon the license, and it was impossible to restore the licensees to the position they occupied before the license was given. Revocation therefore would have been a fraud.

We do not propose, however, to decide that the arrangement alleged to have been made between the plaintiff and

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George Huff, if made at all, was a revocable license. As already said, it was that, or the creation of an easement in lands, or the assurance of an interest either in or out of lands. If it was a revocable license, the instruction given by the court to the jury was confessedly right. If it was a contract it was *in parol*, and the defendants could not defend under it. In neither aspect of the case have they been injured by the charge of the court. Let it be assumed that it was what they claim it to have been, it was still an attempted parol grant of a right or an easement upon the plaintiff's land. The right which it purported to give was a right of "*profit a prendre*," the privilege of taking minerals from the plaintiff's land for the defendants' salt works. Perhaps it was not technically an easement; if not, it was more. Some modern decisions have called it an easement, though it was a privilege on another's land with a profit. In *Ritger* v. *Parker*, 8 Cush. 145, the Supreme Court of Massachusetts defined an easement or servitude to be "a right which one proprietor has to some profit, benefit or lawful use out of or over the estate of another proprietor." And in *Post* v. *Pearsall*, 22 Wend. 425, Chancellor Walworth, in speaking of rights of *profit a prendre*, said, that "such easements are either personal and confined to an individual for life merely, or are claimed in reference to an estate or interest in other lands, as the dominant tenement for a *profit a prendre* in the land of another, when not granted in favor of some dominant tenement, can not properly be said to be an easement but an interest or estate in the land itself."

In *Doe* v. *Wood*, 2 B. & Ald. 724, a grant of a right to search for metals in another's land, and to raise and dispose of the same when found, was called "an incorporeal privilege." It matters not, however, whether the right claimed by the defendants be an easement or an incorporeal privilege in the land. It is incorporeal, as all easement and *profits a prendre* are. Whether one or the other, it is incapable of creation in any other way than by grant or prescription. It is well settled that an easement can not exist in parol. Professor Washburn has collected a large number of cases to that effect in his work on Easements, page 18, note. It is equally true that an interest in land or arising out of it, whether corporeal or incorporeal, must be in grant. It can pass only by deed. The

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Statute of Frauds is applicable to all such interests, and with especial reason when they are incorporeal. Its language is very comprehensive. It applies to all estates, interests of freehold, or terms of years (excepting leases not exceeding three years), or any uncertain interest of, in or out of any messuages, manors, lands, etc., without regard to any consideration that may have passed. In *Yeakle* v. *Jacob et al.*, 9 Casey, 376, a right to cut timber on a tract of land to make rails for the repair of fences on another tract, was held to be an interest in land within the Statute of Frauds. The agreement in that case having been by parol, it was said to be nothing but a license at will, though there was a consideration for it. It was not an agreement made with a view to immediate severance, and not therefore a mere sale of growing timber. There is no distinction to be made between that case and this, founded in the fact that it was a perpetual right. All easements and *profits a prendre* may be held for life in fee, or for years, and the right was no more perpetual in that case than it is in this. All agreements for the sale of growing timber, not made with a view to immediate severance, are contracts for the sale of interests in land, and therefore within the statute: Addison on Cont. 31; *Crosby* v. *Wadsworth*, 6 East, 610.

Without prosecuting the subject further, enough has been said to show that the defendants have no protection in the agreement they set up.

It is clear, therefore, that no error was committed in the court below of which they can complain.

Judgment affirmed.

GLONINGER ET AL. v. THE FRANKLIN COAL CO. ET AL.

(55 Pennsylvania State, 9. Supreme Court, 1867.)

[1] **Instrument construed as license.** A grant to Fell, his heirs, executors, administrators and assigns forever, of "the free right to dig coal at the coal bed on my lot," with the privilege freely to carry the coal, right of egress, regress, etc., at all times hereafter: *Held*, an incorporeal hereditament.

[1] *Doe* v. *Wood*, 9 M. R. 182.

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Not exclusive. The grant is not of an exclusive right; it is a privilege to dig coal at a specified bed and carry it away, not interfering with the owner's right to mine *ad libitum*.

Error to the Common Pleas of Luzerne County.

This was an action of ejectment, commenced June 11, 1863, by C. D. Gloninger and others against Peter Keihrou and others, for a lot of land in Wilkesbarre township, Luzerne county, containing about 106 acres. At the trial, February 24, 1865, the Franklin Coal Company was added as landlord and co-defendant.

Andrew Wickizer, being the owner of the land in controversy, on the 1st day of January, 1808, for the "consideration of $6.50 paid by Edward Fell, of the borough of Wilkesbarre, blacksmith," by deed-poll did "grant, sell and convey to the said Edward Fell, his heirs, executors, administrators and assigns for ever, the free right to dig coal at the coal bed under the foot of the mountain on my lot No. 22, in third division of lands in Wilkesbarre, with the privilege freely to carry the coal from the said lot, as also free egress and regress to and from said coal bed through my land at all times hereafter, doing as little damage as may be, in the uses aforesaid."

On the 6th of May, 1813, Fell, by assignment indorsed on his deed, conveyed "all his right, title and interest" in the premises to Thomas Brown for the consideration of $30.

On the 12th of July, 1819, Brown conveyed to Jacob Hassinger and others "the free, unmolested and exclusive privilege of digging stone-coal, so far as the same extends on said lot No. 22, together with all the privileges that are secured, or meant to be secured to the said Thomas Brown, his heirs and assigns, by the above recited instruments of writing, and also all the estate, right, title, interest, property, claim or demand whatever, of the said Thomas Brown," etc. To have and to hold the above mentioned and described coal bed exclusively, with all the privilege thereunto belonging, unto the said grantees, as tenants in common, etc., "their heirs and assigns forever."

By subsequent conveyances eleven undivided twelfths of the interest which passed by Wickizer's deed to Fell, were vested in The Franklin Coal Company, one of the defendants, the remaining one twelfth belongs to the plaintiffs.

Several veins of coal underlie "lot No. 22;" an opening

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had been made into the "Baltimore vein" near the foot of the mountain and the outcrop of the coal. The lot extends much further up the mountain. The Baltimore vein is supposed to extend under the entire lot and is the principal vein in the Wyoming valley. There are some smaller veins under and over it, but none had been worked on this lot in 1808.

After the jury was sworn, the foregoing facts were agreed to by the parties and submitted to the court as a case stated.

On the 21st of December, 1865, the Court of Common Pleas entered judgment for the defendants, CONYNGHAM, P. J., delivering the following opinion:

"The plaintiffs claim a right to recover an interest in the coal upon lot No. 22, 3d Division of Wilkesbarre township, of the coal right, of which the original plaintiffs, as the heirs of Eliza Hassinger, represent one forty-eighth part, it being agreed that J. W. Gloninger shall be added as a co-plaintiff, so that all together these represent one twelfth part. This is claimed to be either all the coal upon the said lot, northeast of the coal bed at the foot of the mountain, hereafter referred to, or if not all the coal, which is admitted to consist of several distinct and divided veins, at least of the coal upon said lot in the so called Baltimore vein, in the outcrop of which, at the foot of the mountain, the old coal bed was opened in 1808.

"Andrew Wickizer, in 1808, was the owner of this tract of land, both surface and underlying coal, and on the 1st of January of that year conveyed by deed, duly executed and recorded, to Edward Fell, of the borough of Wilkesbarre, blacksmith, his heirs, executors, administrators and assigns, forever, in consideration of the sum of $6.50, 'the free right to dig coal at the coal bed at the foot of the mountain, on my lot No. 22, etc., with the privilege freely to carry the coal from the said lot, as also for egress and regress to and from said coal bed through my land at all times hereafter, doing as little damage as may be in the necessary uses aforesaid.' By various proceedings and conveyances the plaintiffs claim that an undivided interest, as above stated, of that which became vested in Edward Fell under said deed, is now vested in them.

"The main question in the cause depends upon the construction of the above recited deed. If by it a corporeal heredit-

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ament was granted to Edward Fell, the plaintiffs have established a right to a portion of it. We are certainly disposed to sustain the ruling of our Supreme Court in *Caldwell* v. *Fulton*, 7 Casey, 475, re-affirmed in *Clement* v. *Youngman*, 4 Wright, 344, that a grant of an unlimited right, title and privilege to dig and take away the coal on a tract of land to any extent the grantees may think proper, and for a consideration presently paid, is a grant of the coal itself, and not merely of a license or incorporeal right. It is a decision too important to this section of country, where there are so many instances of one person owning the surface and another the underlying coal, for us to desire to disturb it.

"The rule too is well settled that the nature and the quantity of the interest actually conveyed by a deed must be discovered from the deed itself, the subject about which the parties are contracting, and the circumstances and object for which it was made. If this deed was intended to convey to Edward Fell the right to dig and carry away the coal to the exclusion of any right in Wickizer to take any portion of the coal from the tract, or from the vein upon the whole tract into which that coal bed was opened, then it would properly convey a corporeal hereditament, and would fall within the ruling of *Caldwell* v. *Fulton;* if it was intended to be but of an undefined part of the coal, Wickizer still retaining a right to dig and take coal there, as he might desire, as the owner of the lot, then it will be found to be an incorporeal hereditament, and not recoverable in this action of ejectment. From the case of *Clement* v. *Youngman* we learn, also, that though the deed may in form seem to convey or actually convey the exclusive right and privilege of searching, digging and carrying away all iron ore, limestone, etc., still, from other provisions in the deed itself, and circumstances thereby shown to be connected with the transaction, the reasonable intention of the parties may be differently inferred, so as to control the broad and unlimited words in the conveying clauses.

"To understand the present deed aright, and thus get at the true intent of the parties, we think we may revert to the well-known state of our country at the time, and the information we have as to the uses and purposes of stone-coal then; there are some words in the deed that lead us to this thought.

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Tradition and history tell us that on the first day of January, 1808, there was but little knowledge of great coal veins and coal tracts of land, the coal forming the great item of value in such real estate, as is now the case. Coal was then regarded as only capable of being used for ordinary manufacturing purposes by blacksmiths and others, the almost universal opinion being that it could not be used as a fuel from the want of a bellows or strong artificial draft to make it burn. It was not until February 11, 1808, that old Judge Fell, the officer before whom this deed was acknowledged, succeeded in firing coal, so as to prove that it would burn in a grate. There were at that time no large coal mines in operation. Small quantities of coal as were needed by the neighboring blacksmiths were quarried out by the blacksmith and his man at some coal bed, as they were then called, and sometimes by a man employed by the owner, when it was necessary. There were then but few open coal beds in this vicinity. It is believed the Hollenback bed at Mill Creek, the Butler and Bowman bed, (now the great Baltimore Company mines) and then, perhaps, this Wickizer coal bed, made in the outcrop of the vein, were the places from which the blacksmiths in this vicinity obtained their coal; the price of coal for such purposes being mainly the labor of digging it, and then the hauling, with a small compensation to the owner. In this deed the consideration is in fact but nominal, though, perhaps, as Edward Fell was a blacksmith and is so called in the deed, it may have been a real consideration, allowed in the settlement of some blacksmithing bill with Wickizer, thus purchasing a right to go and procure his coal himself—coal for his purposes when he needed it. It is difficult to conceive that these parties really supposed that the one was selling and the other buying the exclusive right to take all the coal upon the tract or even in the one great vein. From the deed itself it is certainly more natural to suppose, that, being made to a blacksmith, both parties believing that coal was of no use except for the purposes of his shop, that it was intended to give a right to go there and take away coal, as the fire of his shop required it. It is, certainly, also more natural to construe such a deed according to the evident understanding of the parties, as applicable to the subject of their contract, the supply of the pur-

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chaser's forge for a small consideration, rather than the transfer of the large body of coal claimed now under either view of the plaintiff's demand. The grant of an open coal bed is like the grant of property with an open mine; there the lessee can dig only in the open mines, and can not sink new pits: 12 Petersdorff's Ab., Tit. Mines.

"The conveyed right is not to search and dig for coal in any place upon the tract, but to 'dig coal *at* the coal bed under the foot of the mountain,' etc., not conveying the coal in the coal bed, etc., or the coal bed, but simply to dig coal *at* the coal bed, etc. Wickizer had an open coal bed there — did he convey to Fell anything more than to come there, dig at the bed, to which point free 'egress and regress,' as it is expressed in the deed, is given to him? Are we called upon to say that when the plain farmer, Wickizer, for a trifling consideration, gave to the blacksmith, Fell, the right to dig coal at his coal bed, that he intended to deprive himself of all right to do the same — that those parties understood that if a more convenient blacksmith be found nearer to the mine, that he could not give to him the privilege to go and dig coal at the same bed, which he had opened, no doubt, at his own expense, and which many blacksmiths might find opportunity to dig at, upon occasional times, without interfering with the earlier claimant of a digging right—or that a year or two later, when the experiment of Judge Fell upon his grate, made of hickory saplings, had become known, and the value of coal as a fuel partially ascertained, that Wickizer, or his grantees, had no right to visit his own coal bed and get some coal for his own new grate, or even if he could find upon his lot, in the rolling of his land, another outcrop, that he could make no new opening because he had parted with his coal right to Fell? The right is not directly limited by words, but neither is it conveyed in the broad terms of the deed in *Caldwell* v. *Fulton*. We can not find in this deed expressions justifying such plain and natural queries as those put by Mr. Justice Woodward in his opinion, 7 Casey, 478. There is no language here showing that the grantor clearly intended to part with all the coal upon the tract, or even all the coal in the ore vein in which the bed was originally made. We have no evidence that it is practicable to work out all the coal upon the tract, or all of the Balti-

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more vein, from the one old coal bed at the foot of the mountain. We know that in every tract there are faults — breaks of continuity in veins from the rising of the land, in what are termed rolls, so that in the extent or length of the tract northeast from the old coal bed, there is no probability that from the opening at the outcrop, the coal even of the one large vein can now be worked. Does all this coal, without regard to such questions, belong to Fell and his heirs and assigns, because he obtained a right to dig coal at the old coal bed — an entrance now perhaps entirely useless for the purpose of following the coal at this time? Have the claimants under Fell, in consideration of the trifling sum paid by them, the right to claim places for engine houses and appurtenances, breakers and refuse dirt, necessary, as we all know now, to mine and prepare coal for market near the old opening or on any other part of the tract? How shall we enter judgment for the plaintiff here? For the old coal bed at the foot of the mountain? This would be too indefinite and uncertain. For all the coal in the tract, or all in the Baltimore vein? What evidence have we, as we have said, that the vein of coal is not so broken that it would be impracticable to procure but comparatively small quantities of the coal from the old coal bed at the foot of the mountain? The claim of plaintiffs would seem to be too indefinite to be regarded as a corporeal hereditament, capable of being delivered in an ejectment. We are at a loss to define the extent of the right—as to say how much coal they may have the right to dig, but in this there is no real difficulty affecting the right. Did not the deed to Fell convey an interest similar to a common in gross *without stint* or *sans nombre?* There may be such a grant to a man and his heirs: 2 Bl. Com. 34; 3 Id. 239. We can give no other reading to so indefinite a grant of a simple right to dig out at a specific opened coal bed, than that it was a right to be used, not exclusive, but in common with the owner of the land. This is a conclusion consistent with the deed itself; the addition of the trade or business of the grantee has more meaning than simply as *descriptio personæ*, connecting it with the subject-matter of the arrangement, as both parties, with the knowledge they then had upon the subject, must have intended.

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"We are of opinion, too, that upon more general principles the case falls within the reason of the case cited by Mr. Justice Strong, in 4 Wright, 344—the quotation from Lord Coke and the cases of *Lord Mountjoy* and *Chetham* v. *Williamson*. Lord Mountjoy's right was 'to take sufficient ore, etc., to make alum and copperas.' Is not the implication as strong in this case that the blacksmith was to take coal for his work, that is, for blacksmithing purposes? Is not this intent as clear as the implied intent to erect iron works in the case of *Clement* v. *Youngman*? The payment of the small consideration of a few dollars at the making of the contract, can not make a very marked difference in the cases. The language of the reservation in *Chetham* v. *Williamson* was much more comprehensive, covering a right to dig and search for minerals over the whole tract; here the right to dig was at only one place, one coal bed, where, from all that appears here, there may be now many coal beds upon the same tract.

"Upon the consideration of the whole case as submitted to us, while we desire to adhere strongly to the true principles decided in *Caldwell* v. *Fulton*, we construe this deed as giving to Fell and his assigns no exclusive right to the coal, and therefore in him and the plaintiffs who claim under him, if they have any right at all, only an incorporeal hereditament, which will not sustain this ejectment. Judgment is entered for the defendants."

The plaintiffs removed the case to the Supreme Court.

S. WOODWARD, for plaintiffs in error.

The deed from Wickizer to Fell is a grant of a corporeal hereditament. It is a grant of coal, and coal is land. *Barney* v. *Sutton*, 2 Watts, 32, is not in accordance with later authorities: *Caldwell* v. *Fulton*, 7 Casey, 476. Wickizer's deed was a conveyance of the coal: *Morris* v. *Phaler*, 1 Watts, 390. That Fell was described as a blacksmith is nothing, as affecting words of limitation in a deed. *Clement* v. *Youngman*, 4 Wright, 346, is not analogous to this case, which is like *Caldwell* v. *Fulton*, *supra*.

A. T. MCCLINTOCK, for defendants in error.

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In *Caldwell* v. *Fulton* the grant gave "the full right, etc., to dig and take away coal to any extent the grantee might think proper under any of the lands of the grantor." This shows an unlimited grant and designates the quantity of land to which the right extends; it therefore gives a right to all the coal under those lands. In the present case the grantee has only the right to take from the "bed under the foot of the mountain." The grant is not exclusive of the grantor, but in common with him. It is to dig an open coal bed; the grantee could not sink new pits. It is a mere incorporeal hereditament: 2 Black. Com. 20; *Chetham* v. *Williamson*, 4 East, 469; *Johnstown Iron Co.* v. *Cambria Iron Co.*, 8 Casey, 241; *Clement* v. *Youngman*, 4 Wright, 341; *Lord Mountjoy's Case*, 4 Leon. 147; Co. Litt. 164, b.

The opinion of the court was delivered May 20, 1867, by READ, J.

This case depends upon the construction to be placed upon a deed-poll, executed by Andrew Wickizer, on the first January, 1808, granting, in consideration of $6.50, unto Edward Fell, blacksmith, his heirs, executors, administrators and assigns forever, "the free right to dig coal at the coal bed under the foot of the mountain on my lot No. 22, in third division of lands in Wilkesbarre, with the privilege freely to carry the coal to and from said coal bed through my lands at all times hereafter, doing as little damage as may be in the uses aforesaid."

The grantor was the owner of the whole tract, and a resident of the township of Wilkesbarre, in which the land was situated, and the grantee was a blacksmith in the borough of Wilkesbarre.

This language does not bring the case within that of *Caldwell* v. *Fulton*, 7 Casey, 478. Caldwell reserved no interest in himself. He sold for a valuable consideration all he had in the sixteen acres, and *all the coal in his other land. I say all*, because the grant is limited to no time, or quantity, or purpose, or person. Can a reservation to the grantor be implied in the face of terms so large? What room was left for the grantor? Might he mine also? Assuredly not against the

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consent of his alienee, for he had sold all the coal that alience might think proper to take or cause to be taken. "An exclusive right to all the coal to be taken without limitation, except as to the point of ingress and egress, is a sale of the coal itself, and there is nothing incorporeal about coal. It is included in the definition of land, and those hereditaments only are incorporeal which are not land." Per WOODWARD, J., Id. 478, 479.

The present case is not an exclusive right in the grantee to dig all the coal, and to any extent, and to exclude the grantor from mining also, and is, therefore, not ruled by *Caldwell* v. *Fulton*. It is more like the case of *The Johnstown Iron Co.* v. *The Cambria Iron Co.*, 8 Casey, 241. "It was not a sale of all the iron ore, notwithstanding the stipulation that the privilege was to be given to none else, because it was to be paid for by the ton, and, of course, no more was sold than should be raised." "The language of Lord Ellenborough in *Chetham* v. *Williamson*, 4 East, 476, is that no case can be named where one who has only a liberty of digging for coals in another's soil has an exclusive right to the coals, so as to enable him to maintain trover against the owner of the estate for coals raised by him." Per WOODWARD, J., Id. 247.

Such a right is not exclusive in the grantee, but to be enjoyed in common with the grantor, his heirs and assigns, and the grant is, therefore, an incorporeal hereditament. The right in the case before us is not exclusive in form, words or spirit, and is simply a privilege to dig coal at a specified coal bed, and carry away the coals so taken and not interfering in any way with the right of the owner of the land to mine *ad libitum*.

It is, therefore, only an incorporeal hereditament, as has been fully explained by the learned judge in the court below.

Judgment affirmed.

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DARK ET AL. V. JOHNSTON ET AL.

(55 Pennsylvania State, 164. Supreme Court, 1867.)

[1] **Reasonable time to prospect.** Where a conveyance was to be made of land if the vendee should find oil upon it, it is to be construed that oil must be found within a reasonable time.

[2] **Oil considered as a mineral fluid.** Oil, like water, is not the subject of property, except in actual occupancy. A grant of water is not the grant of the soil on which it rests, and it passes nothing for which ejectment will lie.

[3] **Essentials of easement.** It is essential to an easement that there should be both a dominant and servient tenement.

[4] **Revocability of license.** Generally a parol license is revocable at the will of the licensor, even although a consideration may have been paid for it; but a parol license executed may become an easement on the land, and where acts have been done in reliance upon the license the licensor will be estopped from revoking it to the prejudice of the licensee.

[5] **License not transferable.** A license is a personal privilege and not assignable; an assignment by a licensee determines his right.

Facts of the case. McGuire granted to Baird a right to sink one or more wells on his land, and agreed to convey to Baird if oil was found; also to grant him an exclusive right to sink wells on other land at $100 for every ten years, for every well Baird might continuously pump oil from; if he should fail to find oil, to have the right to remove his machinery, etc.; if oil were found, the right to pump to continue as the rent should be paid. *Held*, 1. To be a license to Baird. 2. That Baird having made improvements, McGuire could not revoke the license as to him. 3. That Baird having assigned the license, it was determined.

Error to the Court of Common Pleas of Warren County.

This was an action of ejectment, brought September 17, 1864, by William F. Johnston, Isaac M. Pennock, N. P. Sawyer, William Bagaley and S. A. Baird, against John Dark,

[1] *Luckhart* v. *Ogden*, 2 M. R. 601.

[2] That the fluid nature of oil should require distinctions in cases between wells, where one may be charged with unlawfully tapping another, as in *Allison's App.*, 77 Pa. St., 221, *post* OIL, is manifest; but why on that account the arbitrary distinction found in this case should be made, is not clear. No man can reconcile the Pennsylvania cases treating on the distinctions between corporeal and incorporeal hereditaments—for learned obscurity they stand pre-eminent.

[3] *Wolfe* v. *Frost*, 4 Sandf. Ch. 72.

[4] *Winter* v. *Brockwell*, 8 East, 308.

[5] *Coleman* v. *Foster*, 1 H. & N. 37.

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Carlton B. Curtis and others, for 250 acres of land and an island.

On the 26th day of November, 1859, Samuel McGuire, being the owner in fee of the land in dispute, made the following agreement with Samuel Baird, reciting:

"That the said McGuire is the owner of a farm in Tideoute, in Deerfield township, Warren county, Pa., of about two hundred and fifty acres, more or less, running on the Allegheny river, and along and on both sides of the course of McGuire run, about one mile and twenty-six rods, and also an island in said river, opposite the homestead, of about nine acres. On this land petroleum or mineral oil may exist, and said McGuire is desirous of having it explored, and agrees to and with said Baird as follows, viz.:

"First. Said Baird, as full consideration for the right to sink one or more wells or pits on the island, and four trial wells or pits on the farm, pays to said McGuire one hundred dollars before commencing work; and should said Baird find oil on said island, then said McGuire agrees to sell to said Baird the above described island for the sum of five hundred dollars. The one hundred paid on commencing work to be part of said sum; the remaining four hundred to be paid on McGuire's giving him a warranty deed for said island in fee.

"Second. Said McGuire covenants and agrees with said Baird to grant him an *exclusive right* to sink wells and pits for obtaining mineral oil over the rest of said estate, on the following terms and conditions, viz.: one hundred dollars for each and every period of ten years (ten dollars per year), for each and every well or pit that said Baird may *continuously* pump oil from; the continuous pumping of said oil to be the evidence that such wells or pits are used. The rent for each and every well shall be paid yearly.

"It is understood and agreed, on the part of said Baird, that he will not, in boring or sinking such wells or pits, or in erecting the necessary buildings and apparatus to obtain and refine or prepare for market said oil, injure any part of said farm valuable as pasture or tillable; and that any fences interfered with shall be restored into good condition.

"It is further understood and agreed between the parties to this instrument, that in case the said Baird shall fail to find

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rock oil on either the island or farm aforesaid, then he shall be at full liberty to remove any buildings or machinery he may have put up, and the one hundred dollars paid to McGuire shall be in full of every demand.

"And further, should oil be found, then the right to pump oil from the wells shall continue as the said rent is paid, as before mentioned. For and in consideration of the above premises, we hereby bind ourselves and our legal representatives for and to the full performance of the above agreement in every part." On the 2d of April, 1861, McGuire conveyed the land to C. B. Curtis, Josiah Hall and others. Under this conveyance the defendants claim.

There was evidence by the plaintiffs that Baird went into possession of the land and commenced a well on the main land; gave some twenty leases, at about seventeen of which boring was commenced; that some of the wells went down hundreds of feet, and that $20,000 or $30,000 had been expended in boring, building, etc. Curtis, in 1861, brought an ejectment against Baird, who received notice from Curtis to quit, and left in June, 1861. Some of the lessees quit for the war, and at last all left.

On the 29th of June, 1864, Baird conveyed his interest to the plaintiffs, who then brought this ejectment.

The ejectment brought by Curtis against Baird being on the trial list in December, 1864, a nonsuit was taken.

DERRICKSON, A. J., charged the jury.

"The point is, will the lease of McGuire to Baird warrant the bringing of an ejectment? It is dated November 24, 1859, and gives to the latter the exclusive right to explore and bore for oil on the other's farm and island. The lessee entered upon the land and commenced operations, which were continued until he left, under circumstances hereafter mentioned under the remaining question. Had there been no possession taken, it is more than questionable whether the ejectment could be sustained on the bare lease itself. But possession was essential to the lessee's discharge of what was required of him; and with it no interference of the lessor, or others under him, could deprive him of it, at least not until ample experiments had tested the non-existence of oil on the premises; or if he was interfered with improperly and got

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out of possession, he could regain it by virtue of his lease and prior possession under it. * * *

"With the lease, then, and the possession under it, and nothing else to prevent it, we charge that the plaintiffs are entitled to recover.

"It is contended, however, in the second place, that although the lessee commenced and continued his operations till the summer of 1861, he then left and abandoned the land and has remained therefrom ever since. If he did voluntarily abandon the land and yield his rights under the lease, he is precluded now from regaining them; and this is for the jury to determine under the evidence." * * *

The jury found for the plaintiffs, and the defendants assigned the following error, amongst others:

4. The judge erred in charging the jury that "with the lease, then, and the possession under it, and nothing else interfering to prevent it, we charge that the plaintiffs are entitled to recover."

S. DICKSON and BROWN & MCKELVY, for plaintiffs in error.

T. MCCONNELL, R. BROWN and WETMORE & CLARK, for defendants in error.

The opinion of the court was delivered January 17, 1867, by STRONG, J.

The agreement upon which the plaintiffs below rest their right to recover in ejectment is singularly obscure. The avowed motive that induced it was a desire of the owner of the land that an exploration might be made to ascertain whether it contained mineral oil; but what rights it was intended to give to Samuel Baird, the explorer, it is difficult to determine from the language used by the parties; and the difficulty is increased by the fact that the stipulations respecting the island and those respecting the farm are diverse, and yet they are mingled together. So far as it relates to the conveyance of any interest in the lands, the contract is executory. No doubt it amounts to an engagement to sell the island on a certain contingency, but there is no absolute covenant to sell.

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McGuire undertook to make a conveyance of the island if Baird should find oil upon it. To allow to the agreement a reasonable construction it must of course be held that the discovery of oil must be made within a reasonable time. But what interest, if any, did McGuire agree to give in the body of the farm? The plaintiff insists that the agreement amounts to a sale of the oil itself, and that the oil, being a part of the land, is a corporeal hereditament, to recover possession of which ejectment will lie. But if it be conceded that by the contract there was a grant of the oil, it by no means follows from that alone that ejectment is maintainable. Oil is a fluid like water; it is not the subject of property except while in actual occupancy. A grant of water has long been considered not to be a grant of anything for which an ejectment will lie. It is not a grant of the soil upon which the water rests: Coke Lit. 4, v. It would confound all legal notions were it held that an action can be maintained for the recovery specifically of the possession of a subterranean spring or stream of water, no matter whether the waters are mineral or not. There is a manifest difference between a grant of all the coal or ore within a tract of land, or even the grant of an exclusive right to dig, take and carry away all the coal in the tract, (which we held in *Caldwell* v. *Fulton* to be a grant of a corporeal interest,) and a grant of the waters in or on the tract. The nature of the subject has much to do with the rights that are given over it, and to us it appears that a right to take all the oil that may be found in a tract of land can not be a corporeal right. The contract in this case is, in some particulars, not unlike that under consideration in *Clement* v. *Youngman*, 4 Wright, 341. Like that it is the grant of an exclusive right, but no present consideration is agreed to be paid for the oil. It contains no covenants of the grantee either to search for the oil or to become a lessee of wells on the main farm; and what is exceedingly important, it provides for a future conveyance of the island and assurance of rights on the main land, in the event that oil should be discovered. This provision is very clearly indicative of an intention that no present estate should pass, either corporeal or incorporeal. If the agreement referred to in *Clement* v. *Youngman*, was correctly ruled to con-

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vey no corporeal hereditament such as is essential to the maintenance of an ejectment, much more must the contract here be held to be no grant of a corporeal interest in any portion of the farm. There is also no distinct assertion that Baird should have all the oil. At most, his rights are made to extend only to so much as he might find. McGuire does indeed covenant to grant an exclusive right to sink wells for obtaining oil, but even after the grant shall be made, it is only for such wells as he shall continuously pump oil from, that the covenantee is to pay rent. The only clause which expressly grants any right to take the oil is the last, and that is, "Should oil be found, the right to pump oil from the wells shall continue," as the rent is paid. This surely is not a grant of all the oil. Moreover, Baird is expressly authorized to remove his buildings or machinery in case he fail to find oil. This provision is unnecessary if a corporeal right was granted. And the removal of buildings, etc., determine all rights under the contract. In such a contingency the $100 paid are to be in full of every demand. These stipulations point to an intention that nothing more was in contemplation of the parties than a license before the proposed explorations should prove successful, and we think a license is all that Baird acquired. He obtained not even an easement on the land, for it is essential to an easement that there should be both a dominant and a servient tenement; but the right or privilege assured by this contract was not for any other tract of land, but solely for Baird himself.

Regarding, then, the agreement not as a conveyance of corporeal estate, but as a license, we proceed to the consideration of its effect. Generally a parol license is revocable at the pleasure of the licensor, and it is none the less revocable because a consideration has been paid for it: *Wood* v. *Leadbitter*, 13 M. & W. 838. It can not be doubted, therefore, that McGuire might have revoked the license in this case had it been given by parol at any time before Baird had expended labor or money on the faith of it, in prosecuting the explorations. By so doing he might have subjected himself to a liability to respond in damages, but his right to withdraw the permission given would have been inseparable from the nature of the arrangement. Here, however, the license was not parol, it was given by deed. It is not so clear that a license given by deed

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is revocable at the pleasure of the grantor. See the Law of Mines, Minerals and Quarries, by Arundel Rogers, a late English elementary treatise, p. 313. Without pausing to inquire how this may be, how stands the case when a license has not only been granted by deed, but acted upon, and when the licensee, on the faith of it, has made large expenditures? It must be admitted that the license to Baird authorized him to go upon the land, to bore or sink wells, and to erect the machinery and buildings necessary for obtaining oil, or at least for ascertaining whether it existed on the land. The privilege included a right to occupy so much of the surface as was required to enable him to enjoy the main thing granted. These privileges, though not all expressly given, are plainly implied. They would be were no reference made to them. They are, however, spoken of in such a manner as to leave no doubt that it was intended they should go with the right to sink wells; and the evidence given at the trial shows that in the enjoyment of his license Baird did occupy portions of the land, that he expended a large sum of money in sinking wells, and the verdict of the jury establishes that there has been no abandonment.

It has been held in this State that even a parol license executed may become an easement upon the land, and that when acts have been done by one party in reliance upon a license granted to another, the latter will be equitably estopped from revoking it to the injury of the former: *Le Fevre* v. *Le Fevre*, 4 S. & R. 241; *Rerick* v. *Kern*, 14 Id. 267; *Lacy* v. *Arnett*, 9 Casey, 169. These are cases, it is true, where the license was not personal, but where a servitude had been imposed for the benefit of another tenement. In them an easement was allowed in favor of the dominant tenement, appurtenant to it, and passing with it to a grantee of the license, as held in *McKellip* v. *McIlhenny*, 4 Watts, 317. The same reasons which were controlling in these decisions appear to us to be applicable to the present case. Admitting, as we must, that we are not to confound the contingent covenant to sell the island and to accept Baird as a tenant of wells on the main land, with the antecedent rights given to explore, we have still the facts that under the license to explore he was in possession of certain portions of the land; that such possession was authorized; that

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in taking it and continuing it large expenditures had been made, and that neither the occupancy itself nor the right to maintain it has ever been abandoned. Add to this the fact that if oil should be discovered as a result of his search, Baird was assured that he would be entitled to a conveyance of the island and a lease of wells on the main land, and it would seem grossly unjust in McGuire to make all his expenditures fruitless to him, and by revoking the license deprive him of the right, the expectation of which induced his expenditure. If in *Le Fevre* v. *Le Fevre*, there was enough to raise an estoppel and prevent the licensor from denying to the licensee the fruit of his expenditure, there surely is in this. Taking the occupancy of so much land as was necessary for the allowed explorations as was authorized, it was authorized for a consideration, and so was the continuance of the occupation. Call this what we may, an easement, which is an incorporeal right, or a temporary right to possession, defeasible and ended when it shall be ascertained that the land does not contain oil, it was not for Mr. McGuire to take it away. Neither his conveyance of the land nor re-entry by himself, could deprive Baird of the rights obtained by him in virtue of the license and the action under it.

If, therefore, the case stood upon this ground alone, we should be of opinion that the plaintiffs below were entitled to recover the possession of so much of the island and farm as the licensee had taken the occupancy of for the purpose of sinking wells and ascertaining whether oil is to be found. Thus far the disseizin of McGuire or his grantees would be regarded unlawful, and we should feel ourselves justified in sustaining an ejectment to restore a possession wrongfully taken away.

But this ejectment was brought by the grantees of Baird, not by himself; we are, therefore, brought to a consideration of the effect of his grant. Looking to the contract, it is plain the license was a personal privilege. It was given to Samuel Baird and not to his assigns, and it was a privilege to be enjoyed exclusively on the land of McGuire. It was not for the benefit of any other tenement. It was not appurtenant to any other lands, but it belonged exclusively to the person of the grantee. This is affirmable not only of the right to explore,

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but of the right to occupy lands for the purpose of exploration. The latter is only an incident of the former. It is but adjutory of the former. When the right to search for oil is gone, the right to occupy land for such a search is gone with it. That a license is a personal privilege, and not assignable, is a well-settled principle. It is induced almost always by confidence in the character of the licensee. A man may well accord a privilege upon his lands to one person, which he would refuse to all others. Hence, it is held that a personal license is not assignable, and that an assignment by a licensee determines his right. Though a licensor may be estopped from recalling the privilege granted, the licensee may destroy it. He may abandon or release. He can not substitute another to his right. The cases are numerous in which it has been held that his assignment puts an end to the license: *The King* v. *Hewton*, Bridg. 115; *Hull* v. *Babcock*, 4 Johns. 418; *Prince* v. *Case*, 10 Conn. 375; *Emmerson* v. *Fisk*, 6 Greenl. 200. It is true that in *Muskett* v. *Hill*, 5 Bing. N. C. 694, it was ruled that a license to search for and raise metals, and also to carry them away and convert them to the licensee's own use, passes an interest capable of being assigned. But in that case the license was by indenture, it was given to the licensees, their executors, administrators and assigns, and the indenture contained an express provision that the license and authority should be assignable by deed. The case, therefore, is not in conflict with the rule that a personal license is not assignable, in which respect it differs from a grant which carries an interest. Whatever, therefore, might have been Baird's rights had he retained the privilege given to him by the agreement, his grantees can not recover in ejectment.

This view of the case dispenses with the necessity of considering any other than the 4th assignment of error.

The judgment is reversed.

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NEUMOYER ET AL. v. ANDREAS.

(57 Pennsylvania State, 446. Supreme Court, 1868.)

Statutory appeal. The Landlord and Tenant Act of March 21, 1772, gives no appeal from proceedings before the justices and inquest.

Practice on transfer to court of record. Where, upon a claim by the tenant that he has title, acquired after the lease, the proceedings before the justices and inquest are arrested, it is a suspension of the proceedings there, and when the cause is transferred to the court, the court can not try the question submitted to the justices, but can only try the question of title to the reversion acquired since the demise.

Former judgment against landlord no bar in Pennsylvania. Proceedings were commenced before two justices by a landlord, and the inquest found for the tenant. Upon a second proceeding brought by the landlord, carried into court upon the tenant's affidavit of title acquired, *held*, that evidence of the former proceeding was not admissible.

[1] **Licensee's possession no defense to unlawful detainer.** Contract allowing a party for good consideration "to dig all the ore that could be found on the land" of the plaintiff at a royalty: *Held*, a license merely, and no defense to the licensor's action for possession—leaving, however, to the licensee, a remedy for the licensor's improper exercise of the right of possession; the licensee having a right to a qualified possession.

Error to the Court of Common Pleas of Lehigh County. No. 143, to January term, 1868.

This case came into the court of common pleas by appeal (so called) from the proceedings before two justices of the peace, under the act of March 21, 1772 (1 Sm. L. 373, Purd. 613), commenced by Gideon Andreas against George Neumoyer and Conrad Seem.

On the 23d of February, 1864, the plaintiff made complaint before two justices of the peace, that being seized and possessed of a messuage and tract of land, etc., containing seventeen acres, on the 25th of December, 1853, he leased them to the defendants by parol for ten years for the purpose of mining, etc., iron ore, they paying 25 cents per ton for the ore mined; that on the 2d day of October last past, he gave notice to the defendants to quit within three months, and asked for such proceedings by the justice as are directed by law, etc.

[1] *Hyde* v. *Graham*, 1 H. & C. 593.

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At the hearing before the justices, and inquest on the 8th of June, 1864, the defendants filed an affidavit alleging that the title and right to the possession of the land in question are claimed by them under a contract with the plaintiff, made after the date of the lease mentioned in the plaintiff's complaint, setting out the lease, etc., and thereupon asked that the proceedings before the justices should be arrested and certified to the court of common pleas. On the same day they entered into recognizance to the plaintiff to prosecute their claim, etc.

On the trial in the common pleas, before Jones, P. J., the plaintiff gave in evidence his title to the premises, notice to defendants to quit, with proof of service. The defendants having admitted that they were in possession of the premises on the 13th of February, 1864, the plaintiff rested.

The defendants then offered the record of proceedings commenced January 15, 1864, by the plaintiff against the defendants, before two other justices, to recover possession of the same premises under the same lease; in which proceedings the inquest found that "the evidence submitted to them does not sustain the matters of fact in said complaint set forth, and that they therefore find against the claim of the said Gideon Andreas, to have possession of the premises in said complaint mentioned and claimed by him."

"Whereupon it is considered by the said justices that the said Gideon Andreas do not recover possession of the said premises."

The evidence was offered to show that the same question as that then trying had been determined in a former proceeding. The court admitted the offer, reserving the effect of it.

The defendants gave evidence by F. T. Jobst, Charles Snider, John Weaver and Peter Guetter, of facts to show that after the first proceedings it was agreed between the plaintiff and defendants that they should go on and dig ore. This evidence was received under objection by the plaintiff.

The defendants then offered to prove "that after the original contract made between the plaintiff and defendants, in the year 1853, as is set forth in the complaint of Gideon Andreas, a contract was entered into between the plaintiff and defendants in the year 1855, to the effect that if the defendants would sink a well, plank it, and put in an iron pump, and put

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up an engine to pump out the water, the defendants should be entitled to dig all the ore that could be found on the land of the plaintiff, described in the complaint, and should pay him 25 cents for each ton so dug, and that in pursuance of this contract the defendants remained in possession of the premises, sunk one or more wells, planked the same, and put a cast-iron pump therein, and erected an engine to pump the water, and dug ore upon the land up to the time of bringing this suit, for which they paid him semi-annually at the rate of 25 cents and upwards for each ton of ore so dug by them.

"This offer to be followed with proof that the plaintiff has accepted, since this proceeding was commenced, two semi-annual payments for ore dug since this proceeding was commenced, and that the defendants have since that time tendered him semi-annually the amounts due for ore dug by them, which he has refused to receive."

The plaintiff objected to the offer; it was rejected, and a bill of exceptions sealed. The court also ruled out the testimony of the witnesses for defendant.

The defendants requested the court to charge—

"That the decision made by the justices and jury in the former proceeding was final and conclusive between the parties, and the verdict must therefore be for the defendants."

To which the court answered—

"We can not give this instruction. There being no evidence for the defendants before you, we think your verdict should be for the plaintiff, and instruct you accordingly."

The verdict was for the plaintiff.

The defendants took a writ of error, and assigned for error: 1. The rejection of their offer of evidence; 2. Striking out the testimony of the defendants' witnesses, and 3. The charge of the court.

C. M. RUNK and E. J. FOX (with whom was F. A. BALDWIN), for plaintiffs in error.—As to first error, cited *Caldwell* v. *Fulton*, 7 Casey, 476; *Johnstown Iron Co.* v. *Cambria Iron Co.*, 8 Id. 246; *Moore* v. *Small*, 7 Harris, 467; 1 Story's Eq. §§ 759, 761, 763; *Debozear* v. *Butler*, 2 Grant, 422; *Young* v. *Glendenning*, 6 Watts, 509; *Steele* v. *Thompson*, 3 P. & W. 38; Act of 1772, *supra; McGee* v. *Fessler*, 1 Barr, 131; *Clement* v.

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Youngman, 4 Wright, 345; *Chetham* v. *Williamson*, 4 East, 469; Co. Litt. 46; *Caldwell* v. *Copeland*, 1 Wright, 431; *Armstrong* v. *Caldwell*, 3 P. F. Smith, 284; *Funk* v. *Haldeman*, Id. 229; *LeFevre* v. *LeFevre*, 4 S. & R. 241; *Rerick* v. *Kern*, 14 Id. 271; *Wood* v. *Ledbitter*, 13 M. & W. 840 and cases in note; *McKellip* v. *McIlhenny*, 4 Watts, 317; *Swartz* v. *Swartz*, 4 Barr, 353; *Huff* v. *McCauley*, 3 P. F. Smith, 206; *Blashford* v. *Duncan*, 2 S. & R. 480; *Hohly* v. *German Reformed Society*, 2 Barr, 293; *Shaffer* v. *Sutton*, 5 Binn. 230; Taylor's Land. and Ten., § 369; 2 Bl. Com. 41; Gilbert on Rents, 20; 2 Washb. Real Prop. 9; *Turner* v. *Reynolds*, 11 Harris, 206; *Essler* v. *Johnson*, 1 Casey, 350.

On the 2d assignment: 4 Kent's Com. 112.

On the 3d assignment they cited *Ayres* v. *Novinger*, 8 Barr, 414; *Marsh* v. *Pier*, 4 Rawle, 273; *Man* v. *Drexel*, 2 Barr, 210; *Souter* v. *Baymore*, 7 Id. 417, and the cases there cited; *Fahnestock* v. *Faustenauer*, 5 S. & R. 174; *Blashford* v. *Duncan*, 2 Id. 480.

J. D. STILES and S. A. BRIDGES (with whom was G. B. SCHALL), for defendant in error, cited act of 1772, *supra*.

On first assignment: *Newell* v. *Gibbs*, 1 W. & S. 496; *Cunningham* v. *Gardner*, 4 Id. 126; *Debozear* v. *Butler*, 2 Grant, 417; *Greenlee* v. *Greenlee*, 10 Harris, 227; *Brawdy* v. *Brawdy*, 7 Barr, 157; *Christy* v. *Barnhart*, 2 Harris, 262; *Moore* v. *Small*, 7 Id. 461; *Poorman* v. *Kilgore*, 2 Casey, 365; *Postlethwait* v. *Frease*, 7 Id. 472; *McKowen* v. *McDonald*, 7 Wright, 441; *McClure* v. *McClure*, 1 Barr, 378; *Clark* v. *Everly*, 8 W. & S. 232; *Moore* v. *Miller*, 8 Barr, 283; Co. Litt. 45; Bac. Abr. *Lease*, K.

The opinion of the court was delivered March 27, 1868, by AGNEW, J.

It is necessary to lay out of the cause several of the questions presented, by stating the true position of the case before us. This is not an appeal from the decision of the justices and jury in the landlord and tenant proceeding before them under the act of 21st March, 1772. That act gives no appeal. It came into the court of common pleas upon a re-

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cognizance taken before the justices under the 13th section of the act, which remitted the tenants to that court to prosecute their claim of title acquired after the commencement of the lease and set up in their affidavit to arrest the proceedings of the justices and jury. On this being done the act proceeds to say that the justices shall *forbear* to give their judgment. It then provides that if the person setting up this after-acquired title shall fail to prosecute his claim, the recognizance shall be forfeited to the landlord, and the justices shall *proceed to give judgment* and cause the premises to be delivered to the landlord. As remarked by Gibson, C. J., in *Steele* v. *Thompson*, 3 P. & W. 37, this is a *suspension* of the proceedings before the justices and freeholders, in order to have the judgment of the court of common pleas on the question whether the landlord has not parted with his reversionary right, *since* the demise. It is evident, therefore, that when the case came into the common pleas it was not to try the questions committed by the act to the decision of the justices and freeholders, but that of title to the reversion acquired after the demise. The *onus*, as remarked by Rogers, J., in *Newell* v. *Gibbs*, 1 W. & S. 500, is thrown on the tenant. It is the trial of a collateral fact: per Gibson, C. J., *Clark* v. *Everly*, 8 W. & S. 232. This being the attitude of the case in the common pleas, it is obvious that the plea of a former finding of two justices and a jury of freeholders, as well as the alleged settlement and continuance of the lease, were defenses that belonged to the *forum* of the justices and jury and not to that of the common pleas. Indeed, according to the opinion of Tilghman, C. J., a finding by the jury for the tenant has no effect upon a subsequent proceeding. He says in such case no record is directed to be made and consequently no judgment is given for the tenant, nor can he in any subsequent proceedings avail himself of the opinion of the jury: *Galbraith* v. *Black*, 4 S. & R. 212. Without now deciding upon the effect of a finding by the freeholders for the tenant, it is sufficient to say that the plea of a former finding was out of place in the proceeding before the court of common pleas.

But it is contended, under the doctrine of *Steele* v. *Thompson*, *supra*, that there was no jurisdiction in the justices and freeholders, for the want of a lease, such as would confer it

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under the act of 1772, and therefore that judgment in the common pleas should have been for the tenant. The argument is founded upon the rejected offer referred to in the first assignment of error, but overlooks its terms. The offer was to prove that *after* the original contract made between the plaintiff and defendant in the year 1853, as it is set forth in the complaint of the plaintiff, a contract was entered into between the plaintiff and defendant in the year 1855, to the effect, etc. Thus the offer was not to show that the *original* contract upon which the plaintiff grounded his proceeding before the justices was not such a lease as to give them jurisdiction, but that the subsequent contract vested a different estate in the defendant from that which he had under the original lease. It is not denied that the original lease set forth in the complaint, to wit, for ten years, at a rent of twenty-five cents per ton for all the iron ore mined and taken away, came within the terms of the act of 1772. The doctrine of *Steele* v. *Thompson* is therefore not applicable, and we are now brought to consider the error assigned upon the rejection of the offer already referred to, in its only proper aspect as proof of a title to the reversion acquired after the inception of the lease. The offer was to prove a contract "to the effect that if the defendants would sink a well, plank it and put in an iron pump, and put up an engine to pump out the water, the defendants should be entitled to dig all the ore that could be found on the land of the plaintiff described in the complaint, and should pay him twenty-five cents for each ton so dug; and that in pursuance of this contract the defendants remained in possession of the premises, sunk one or more wells, planked the same, and put a cast-iron pump therein, and erected an engine to pump the water, and dug ore upon the land up to the time of bringing this suit, for which they paid him semi-annually at the rate of twenty-five cents and upward for each ton of ore so dug by them." The court rightly rejected this offer for several reasons. The lease set forth in the complaint before the justices was for a piece or parcel of land containing seventeen acres, more or less. The claim made by the tenant, which he was remitted to the court of common pleas to prosecute, was for an alleged title or right of possession acquired by contract to the demised premises.

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But the offer made in the court below was to show only a title "to dig all the ore that could be found on the land of the plaintiff." Now, whether this constituted a title to the ore in place, or a license to dig it, it was no answer to the landlord's right to repossess the demised premises. If it be a title to the ore, it was no reason why the landlord should not be restored to the possession of the surface of the land and to the use of all the other minerals, of timber and other rights of property which did not pass by the ore contract. If it were a contract for the ore itself and conferred a corporeal estate in it, the contract was by parol, and there was no offer to prove a possession, delivered in pursuance of the new contract. The only offer was to show that the defendant *remained* in possession, sunk one or more wells, etc. The case, therefore, fell within the Statute of Frauds and Perjuries, while the labor and materials expended in the improvements were easily capable of compensation.

But we are of opinion that the contract set forth in the offer amounted to no more than the evidence of a license to dig ore, and not of a title to the ore in place. It falls not within the principle of *Caldwell* v. *Fulton*, 7 Casey, 475, but rather within the decisions in *Johnstown Iron Co.* v. *Cambria Iron Co.*, 8 Casey, 241, and *Clement* v. *Youngman*, 4 Wright, 341. It resembles *Caldwell* v. *Fulton* in this, that the right to dig ore extends to all the ore upon the land; but it differs from it in the fact that no consideration passed to support a present conveyance of all the ore. That was a formal conveyance for a present consideration, this is a mere contract for the ore at 25 cents for each ton which might be dug. The well, pump and engine were but the means to be used in reaching and lifting the ore. If the title to the ore itself passed, then the plaintiff must be deemed to have parted with it forever without compensation, until it should suit the defendant to dig and pay for it. Having no express covenant compelling the defendants to dig a certain quantity or to mine it within a given time, the plaintiff has no adequate means of enforcing compensation and no measure to fix its amount. It is unlike the case of *Watson* v. *O'Hern*, 6 Watts, 362, which was a lease for a certain term of years with express covenants that fully implied a covenant to work the quarry, and a standard of product

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which insured to the landlord an amount of rent, at least to the extent of the tenant's business and the contracts for stone which the landlord might make. But here, when shall the defendants take out ore, how much shall they mine? The whole is left in a dubious and uncertain state, and therefore incompatible with the idea of a present conveyance, and being made by parol, can not be looked upon as more than a license, without doing injustice and manifest violence to the intention of the parties. This conclusion is supported by the cases referred to in 8 Casey, 241, and 4 Wright, 341. See also *Funk* v. *Haldeman*, 3 P. F. Smith, 229. Then, as a license, it would confer no right to the possession of the land described in the landlord's complaint, but a mere right to enter and dig for ore, with such a qualified possession as would enable the defendants to prosecute their digging and taking away the ore, and would therefore be no barrier to the plaintiff's recovery of the possession generally after the expiration of the lease, leaving the plaintiff liable for any improper exercise of his right of possession which might interfere with any valid contract he may have made for a license to dig the ore on the land.

Judgment affirmed.

JOHNSTON ET AL. v. COWAN.

(59 Pennsylvania State, 275. Supreme Court, 1868.)

License, within the Affidavit of Defense Law. Cowan, by writing, granted to Johnston and others, as partners, the privilege to take clay from his land for twenty years, at twelve cents per ton, they to pay $150 at the end of every six months, although they should not then have taken away so much clay as would amount to that sum. *Held*, that the writing was an instrument for the payment of money within the Affidavit of Defense Law.

Assessment of damages by clerk of court. The plaintiff, by a special count, set out that the defendants agreed, in writing, to pay him "$150, on the 1st of October, 1866; $150 on the 1st of April, 1867; $150 on the 1st of October, 1867; and $150 on said dates semi-annually thereafter, a copy of which agreement is hereto attached," etc. *Held*, to be sufficiently specific for the court to order a liquidation by the prothonotary. A copy of the claim being filed showed that no more could be recovered than was due on it.

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[1] **Construction—Minimum rent.** The writing was an agreement to pay for the privilege of taking clay, whether exercised or not, and the installments were neither liquidated damages nor a penalty, but an alternative price.

Statute of Frauds. The agreement was signed by the grantor, and the firm name of the grantees was signed by one of them. *Held*, that if it were the grant of an interest in land, it was a sufficient signing within the Statute of Frauds, the owner having signed, which bound him.

Idem—Grantee need not sign. The owner who conveys must be bound by writing, but the other party, for anything contained in the statute, need not so be bound.

Error to the Court of Common Pleas of Westmoreland County, No. 47, to October and November term, 1868.

This was an action of assumpsit commenced on the 14th of November, 1867, in which Edgar Cowan was plaintiff, and Thomas Johnston, James M. Taylor, John C. Taylor and Isaac Reese, partners, trading as Johnston, Taylor & Co., were defendants.

The plaintiff declared, on the common counts, for an indebtedness of $1,000, and also in a special count, setting out that "on the 9th day of September, A. D. 1865, the defendants entered into an agreement in writing with said plaintiff, obligating themselves to pay unto said plaintiff one hundred and fifty dollars on the 1st day of October, A. D. 1866, and one hundred and fifty dollars on the 1st day of April, A. D. 1867, and one hundred and fifty dollars on the 1st day of October, 1867, and one hundred and fifty dollars on said days semi-annually thereafter (a copy of which agreement is hereto attached), and then and there delivered the said agreement to the said plaintiff and promised to pay the plaintiff the same, according to the tenor and effect thereof. But the defendants did not pay the same," etc.

The agreement was "between Edgar Cowan * * * of the first part, and Thomas Johnston, James M. Taylor, John C. Taylor and Isaac Reese, partners, trading as Johnston, Taylor & Co., of the second part." By it Cowan granted "unto the said parties of the second part, the right and privilege to dig, mine, take and carry away fire clay, such as is used in the manufact-

[1] *Bell* v. *Truit*, 8 M. R. 649; *Fisher* v. *Milliken*, 8 M. R. 395.

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ure of fire brick, for the term of twenty years from and after the 1st day of April next, 1866, of and from all that certain tract, etc. * * * In consideration whereof the said parties of the second part covenant and agree to and with the said Cowan, that they shall well and truly pay * * * twelve cents for each ton of said clay taken and carried away from said tract by them during the term aforesaid. That they will keep a just and true account of the number of tons mined and taken away, and on the 1st day of October, 1866, and on the 1st day of April and October in each year thereafter, during the said term, shall render the same to said Cowan, and pay for the same at the rate aforesaid, if the number of tons exceeds 1250, and if less than that amount then they are to pay on each of the days above mentioned, $150. It being distinctly understood, covenanted and agreed to, by the parties of the second part, that they will pay $150 every six months during the term aforesaid, although they may not have mined and taken away an amount of clay equivalent, previous to the time the said sum falls due; but if they take more they are to pay for the same as above. And if in any one period of six months they shall not take 1250 tons, then after paying for the amount they may make up for the deficit in the next succeeding period of six months, and not afterward. * * *

"It is further agreed that in case the parties of the second part shall fail to pay the semi-annual payments when the same become due, then, at the option of the said Cowan, he may re-enter and repossess the premises at any time after ten days from such failure; and his re-entry and repossession of the premises shall not affect his right to other remedies at law for the recovery of any moneys due on this agreement. Said Cowan also agrees that the parties of the second part may enter immediately and take clay, to be accounted for and paid 1st October, 1866.

"Witness our hands.

EDGAR COWAN.
JOHNSTON, TAYLOR & Co.
Per Isaac Reese."

An affidavit of defense was made by James M. Taylor, one of the defendants, as follows:

1. The defendants are not in any way indebted to the plaint-

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iff, unless under and by virtue of the copy of the supposed agreement filed.

2. The contract or agreement was only the grant of a privilege to mine the clay, and the defendants did not bind themselves to take any clay, and never took any clay—never entered on the land nor made any erections thereon, in pursuance of said agreement, and not having enjoyed any benefit or advantage under it they are not bound to pay the plaintiff any sum of money whatever.

3. The stipulation for the payment of $150 semi-annually has reference to the probable event that the defendants would mine and take away some clay, but less than 1250 tons semi-annually; but this stipulation had no reference and does not apply to the event which has happened, that no clay whatever was taken.

4. The $150 semi-annual payment was in the nature of a penalty, and equity will restrain the collection of this sum, or any sum under it, beyond the actual damage, if any.

5. Under the Statute of Frauds, and also under the law applicable to partners, upon the face of the pleadings, Reese only can be held, not the firm.

6. The lease or license is void under the Statute of Frauds and Perjuries, the supposed lessees never having entered and the supposed lease not being signed by the parties to be charged therewith; even Reese does not sign it for himself within the meaning of the statute, because he set forth that the firm had signed through or by him and he had no written authority to place the names of the partners or firm to the agreement.

The court below delivered the following opinion: "I do not think this contract is a lease or interest in the land, but a lease to enter for a special purpose, and not under the Statute of Frauds. Being a mere privilege for partnership purposes, one partner may bind his copartners by an instrument not under seal.

"The objection that the defendants have not availed themselves of the privilege, comes with a bad grace from them, as they tied up the plaintiff's hands from making any other contract.

"I look upon the amount in the agreement as a contract for

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a specific sum for an annual privilege, and, as there is no allegation of fraud and nothing but the neglect of the defendants themselves, and no hinderance by plaintiff is therefore binding.

"Judgment, therefore, for plaintiff, for the amount claimed for want of a sufficient affidavit, etc."

The damages were liquidated at $474.

The defendants took a writ of error, and assigned for error the entering judgment for plaintiff for want of a sufficient affidavit of defense and for the amount claimed by the plaintiff.

H. P. LAIRD, for plaintiffs in error.—The judgment was for "the amount claimed" which may be the sum claimed in the common counts, and all the sums mentioned in the special count. Judgment for the "amount claimed" is erroneous. There is no cause of action on the special count; there is no consideration set out. Where some counts are defective, and the judgment is general, it is error: *Stuart* v. *Blum*, 4 Casey, 225. The agreement is not such an instrument for the payment of money as would authorize a judgment for want of an affidavit of defense: *Dewart* v. *Masser*, 4 Wright, 302. The grant is an incorporeal hereditament: *Muskett* v. *Hill*, 5 Bing. N. C. 694; *Yeakle* v. *Jacob*, 9 Casey, 376; and within the Statute of Frauds; at most it would bind Reese alone; but even he would not be bound, for he does not sign for himself. Equity would treat the sum mentioned as a penalty, and limit the recovery to the actual damage: 2 Story's Eq. J., 1318; *Burr* v. *Todd*, 4 Wright, 206; Addison on Contracts, 1161–1163; Sedgwick on Meas. of Dam., 398, 399, 406, 408, 411, 412, 419, 421, 423.

H. D. FOSTER, for defendant in error.—If there could be any injury by entering judgment generally it is cured by the liquidation, which will protect the defendant against another action: *Stuart* v. *Blum*, *supra*. A sum, by the agreement, was to be paid every six months; it is therefore an instrument for the payment of money: Act of 14th April, 1846. The contract is not within the Statute of Frauds: *McKellip* v. *McIlhenny*, 4 Watts, 317. It is signed by the party to be charged, which is sufficient: *Lowry* v. *Mehaffy*, 10 Watts, 387. The sum is liquidated damages: *Crisdee* v. *Bolton*, 3 Carr. & P. 240; *Streeper* v. *Williams*, 12 Wright, 450.

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The opinion of the court was delivered November 16, 1868, by THOMPSON, C. J.

It is important to settle first, whether the article of agreement declared on is an instrument of writing for the payment of money within the rule of court and act of assembly; if not, the other questions would, so far as this case is concerned, be immaterial. But we are very clear that it is such instrument in the covenant declared on. The article is an agreement for the privilege of digging, mining and taking away clay for the manufacture of fire brick, from the land of the plaintiff; and for every ton exceeding 1250 and including that number, the defendants agree to pay, semi-annually, twelve cents per ton. But if less than that amount were taken, the privilege was to be paid for in a gross sum semi-annually, to wit, $150 for every period of six months.

The *narr.* claims to recover on this clause of the agreement. It is a fixed and certain sum, not contingent or conditional, and if the agreement be good for anything, it is extinguishable only in money. In *Frank* v. *Maguire*, 6 Wright 77, a lease reserving rent was held to be an instrument in writing for the payment of money under the act of 28th March 1855, relating to the District Court of Philadelphia, substantially, in its provisions, similar to the rules of court in this case. Such also was the decision in *Dewey* v. *Dupuy*, 2 W. & S. 553. The instrument before us is equally well entitled to be regarded as an instrument for the payment of money, as was either of these cases, and we so hold it to be.

The defendants filed an affidavit of defense to the plaintiff's claim; what defense was set forth we do not certainly know, as it is not in the paper books, but presuming it to have contained or raised the matters insisted on in argument, we will briefly notice them.

We think the special count was specific enough to enable the court to order a liquidation by the prothonotary. Besides the article of agreement was filed as a copy of the claim, and no more could be recovered than was due on it. This was shown both by the covenant and copy of claim.

It was further insisted that the contract was but a license, and if no clay were taken no money was to be paid. We do

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not agree that this is the true interpretation of the instrument, or that that was what the parties meant by it.

The covenant to pay for the privilege granted, and on which the action and count were founded, is as follows. After stipulating for payment by the ton, when it exceeded 1250 tons taken, semi-annually, it provides, "and if less than that amount, then they (the grantees) are to pay, on each of the days above mentioned, $150; it being distinctly understood and covenanted and agreed by the parties of the second part (Johnston, Taylor & Co.) that they will pay $150 every six months during the term aforesaid, although they may not have mined and taken away an amount of clay equivalent, previous to the time the said sum falls due; but if they take more they are to pay for the same."

It then appears that the parties to the contract endeavored to be explicit, and to express clearly their understanding, by this clause, and we think they fully succeeded in expressing without ambiguity that the defendants were to pay for the privilege of mining and taking away clay, whether they should choose to exercise it or not. It is not very material to refer the rights acquired under the contract to any specific class of interests in, or arising out of real estate, for the intention to grant a privilege and to pay for it in a specified way and at definite periods is clearly expressed, and the soundest rule in the world is that which carries into execution the intention of the parties. It is highly improper to call the fixed sums to be paid in the event of the *minimum* of clay not being taken, *liquidated* damages. It is an alternative price to be paid in an event which it was foreseen might happen, not as damages, but in payment for the privilege. However this may be, it is certain it is nothing like a penalty. We hold that the contract was not a mere license, but the grant of a right or privilege which the parties were bound to pay for, whether they enjoyed it or not. This was their contract, and they must abide it.

We are of opinion, also, that even if, as the defendants claimed, this was a grant of a corporeal interest, a hereditament, there was a sufficient signing to take the contract out of the Statute of Frauds and Perjuries. Cowan, the grantor, owner of the land, signed, and that bound him; and this was

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sufficient: *Lowry* v. *Mehaffy*, 10 Watts, 387. The covenantees could enforce the contract against him, for he was bound, as the statute requires, by writing. The intention of the framers of the statute was to prevent titles from being divested by parol. Hence he who has a title to convey, must be bound by writing, but the opposite party need not be, on account of anything contained in the statute, for he is not parting with title, and he may recover a conveyance without a written assent. But in this case we hold, as clearly indicated, that the contract before us was not a sale of a corporeal interest but a mere privilege. This is sustained by *Grove* v. *Hodges*, 5 P. F. Smith, 504. We see no reason, therefore, why one member of the firm could not bind the firm by signing the firm name in the course of its business. Nothing appears to show us that the contract was beyond its scope. Without enlarging, we think that the court below committed no error in entering the judgment complained of.

Judgment affirmed.

HURD v. GILL.

(45 New York, 341. Court of Appeals, 1871).

Refusal, by licensor, to specify place of digging. Defendant agreed to allow plaintiff to dig molding sand on plaintiff's land, at an agreed rate per ton, the places for digging to be designated by defendant. After exhausting the sand at the first point designated, defendant refused, upon request, to designate any other place at which he might dig. *Held* a breach of his contract by defendant.

[1] **Extrinsic consideration.** A consideration may be shown by evidence, extrinsic to the terms of the contract.

Appeal from a judgment of the General Term of the Supreme Court of the Second Judicial District for the defendant, the plaintiff having been nonsuited at the circuit, and the exceptions having been ordered to be heard in the first instance at the general term.

This was an action on an alleged breach of contract. By the terms of the contract, the defendant agreed to allow

[1] *Irvine* v. *McKeon*, 23 Cal. 472.

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plaintiff to dig molding sand on his premises, in places to be designated by him (the defendant), at the rate of twenty-five cents per ton. In was further stated to be "understood that the digging shall commence in the spring of 1867, upon opening of navigation, and cease at its close." The defendant denied the breach of the contract. On the trial it was shown that the plaintiff had dug sand on the defendant's farm, at a place designated by the defendant, at the opening of navigation in 1867, and continued till the latter part of June, when molding sand at that place was exhausted. There was an abundance of molding sand to be had at other places on the defendant's farm, and the plaintiff called upon the defendant to designate a place for him to dig. The defendant refused to designate any other place. The plaintiff was nonsuited on the ground that the defendant was not obliged to designate more than one place. The exceptions were ordered to be heard, in the first instance, at the general term, where judgment was ordered in favor of the defendant.

HOMER A. NELSON, of counsel for appellant, insisted that refusal of defendant, was a breach of his contract: *Westcott* v. *Thompson*, 18 N. Y. 363; *Norton* v. *Woodruff*, 2 Id. 153; *Angevine* v. *Storm*, 2 Conn. 781; *Hollingsworth* v. *Fry*, 4 Dall. 345; *U. S.* v. *Grundy*, 3 Cranch, 337; *U. S.* v. *Gurney*, 4 Id. 333; *Bradley* v. *Washington Steam Packet Co.*, 13 Pet. 89; *Slater* v. *Emerson*, 19 How. 224; *Auburn City Bank* v. *Leonard*, 4 Barb. 119.

A. ANTHONY, for the respondent.

ANDREWS, J.

It was assumed by the court, on the trial, that the defendant was bound by the contract proved. No question as to the consideration was made. The plaintiff was nonsuited, on the ground that the defendant had performed the contract when he had designated one place on his farm from which molding sand might be taken by the plaintiff, and that he was not bound to designate another when the supply at the place first designated became exhausted. It had been shown by the plaintiff that in June, 1867, the supply of sand failed at the place des-

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ignated, and that although it could have been procured elsewhere on the premises the defendant refused to designate any other point from which the plaintiff might take it.

The contract is not, we think, subject to the limited construction which was given to it. It does not indicate any intention on the part of the defendant to restrict the taking of sand to a single location. The permission to the plaintiff to dig it covered the whole time between the opening and close of navigation. He was authorized to dig in "such places" as should be designated by the defendant, implying that several or successive designations might become necessary. The defendant reserved the right to indicate the points from which the sand should be taken, but the right of the plaintiff to sand from the premises was not terminated by the failure of the supply at a given point.

The agreement sued upon does not show upon its face any consideration which will support an action upon it against the defendant.

The plaintiff does not agree to take any sand, nor is there any understanding on his part which furnishes a consideration for the agreement of the defendant: *The Chicago and Great Eastern R. R.* v. *Dane*, 43 N. Y. 241. But a consideration may be shown by extrinsic evidence, and as this point was not raised on the trial, we can not assume that such consideration did not exist.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All the judges agreeing, judgment reversed and new trial ordered.

LUNSFORD, Respondent, v. LA MOTTE LEAD CO., Appellant.

(54 Missouri, 426. Supreme Court, 1873.)

[1] **License by working under company rules—Revocation—Title in ore severed.** In 1838 the proprietors of the Mine La Motte published a set of rules under which the miners signing them had a right to extract minerals. In 1848 a new set of rules was promulgated among them, the

[1] *Lockwood* v. *Lunsford*, 7 M. R. 532; *Desloge* v. *Pearce*, 9 M. R. 247.

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right of revocation being expressed. Plaintiff worked under the rules. and after notice of revocation quit work, but afterward resumed, and extracted ore, which the company seized. *Held*, that the agreement was not a lease, but a license revocable at the pleasure of the proprietors, and that the miner, after resuming against objection, was a mere wrongdoer, and acquired no title to the ore severed.

[1] **Adoption of scroll as seal of several.** A deed purporting to be executed under the hands and seals of the grantors, is the deed of all the signers, although there be not a scroll opposite each name.

Appeal from St. Francois Circuit Court.

B. B. CAHOON and JOHN F. BUSH, for appellant.

1. The two scrawls following the names or signatures to the deed, were a sufficient sealing of the deed for all the parties or grantors. In the absence of explanatory evidence, the law imputes or attributes one of the two seals to Radcliffe B. Lockwood, and the other to William A. Scott, and Amelia Scott, his wife: *Tasker* v. *Bartlett*, 5 Cush. 359; *Bowman* v. *Robb*, 6 Pa. St. 302; *Bohannons* v. *Lewis*, 3 Monroe (Ky.), 378; *Townsend* v. *Hubbard*, 4 Hill, 357; *Ball* v. *Dunsterville*, 4 Term, 313; *Mackay* v. *Bloodgood*, 9 Johns. 285; Perkins, Conv., 59–134; Washb. Real Prop., 570; 1 Shep. Touch., Am. Ed., p. 56, 57; Stark. Ev., 508.

W. H. NALLE and M. L. CLARDY, for respondent.

VORIES, Judge, delivered the opinion of the court.

This suit was brought in the Madison Circuit Court, and afterward removed to the county of St. Francois by change of venue. The action was in the nature of an action of trover and conversion.

The petition stated that the defendant was a corporation organized under the laws of this State; that on or about the first day of June, 1870, defendant, by its agents and servants, unlawfully and willfully took and carried away one hundred and fifty thousand pounds of blue mineral or sulphuret of lead, the personal property of plaintiff, of the value of thirty dollars per thousand pounds, and converted the same to defendant's use, without the consent of plaintiff.

[1] Seal presumed where attestation clause calls for it: *Starkweather* v. *Martin*, 28 Mich. 471; *Flowery Co.* v. *North Bonanza Co.*, 16 Nev. 302. Seal affixed after delivery is retroactive: *Davis* v. *Hall*, 92 Ill. 89.

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The petition further states that by virtue of a written lease signed by the proprietors of the Mine La Motte, or their agents, lawfully authorized, he was in possession of a tract or lot of mining ground, that is, one log house, one and one half stories high, together with the appurtenances thereto, and a certain lot of ground formerly occupied by Christ. Belten, and bounded on the south by a lot formerly occupied by Bais & Co., the same being known as the "Lunsford shaft," or the "Sulpheret lead," being a part of the Mine La Motte tract of land situated in the counties of Madison and St. Francois; that as said lessee he had dug from and mined the said ores from said ground and placed them in the usual manner at the mouth of the shaft preparatory to having them hauled away and prepared for smelting; that the defendant, through its agents and managers, obtained from the judge of the circuit court at chambers, an injunction restraining plaintiff from further mining in said shaft; that after the issuing of said injunction the defendant committed the trespass first charged.

Judgment is prayed for $4,400.

The defendant, in its amended answer, denies all of the material allegations in the petition, except that it is a corporation organized under the laws of this State; and for another and further defense it states that at the time of the supposed trespass and conversion of said mineral the defendant was the owner with the immediate right of possession of said mineral, and was the owner and had the right to the immediate possession of the said premises from which said minerals were dug, before and during the time of the pretended raising and extracting of said mineral from said premises by plaintiff; and that plaintiff at said time had no right whatever to the possession of said premises, or to mine or remove mineral therefrom; and that any occupation of said premises or taking of minerals therefrom by plaintiff was a mere trespass upon the rights of the defendant; and for further defense defendant stated that plaintiff's claim, right or title to said minerals, was the subject-matter of and in issue in a cause which R. B Lockwood and William Scott (from whom the defendant derives title to the premises which the petition describes), as plaintiffs, brought in the Madison Circuit Court against said plaintiff, being an action to enjoin said Lunsford from mining said

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premises, and for other purposes; that since the commencement of this action the proceedings to enjoin said Lunsford have been heard and determined by said court, and the claim which the plaintiff presents in this action, and his right to said minerals and premises fully adjudicated; that such adjudication was had in September, 1871, and that the same was against the claim and title of plaintiff to said premises and mineral sued for in this action.

The defendant also sets up as a defense to this action that before the commencement of this suit, and before plaintiff had dug and raised the mineral sued for, one Radcliffe B. Lockwood, who was at the time the owner in fee of the premises from which the minerals were taken, had commenced an action for unlawful detainer against said plaintiff to recover the possession from said plaintiff of the premises from which said minerals were taken or mined; that in the month of September, 1869, said Lockwood recovered a judgment against said plaintiff for the possession of said premises, and that said minerals sued for were wrongfully mined and taken from said premises after such judgment and before the writ for the possession of said premises issued thereon was executed by the officer in possession thereof; that defendant purchased said premises of said Lockwood, and after said purchase said minerals were mined and raised without its consent, and in defiance of its rights, etc.

The defendant also set up several other defenses which it is not necessary to notice. The plaintiff filed a replication denying the new matter set forth in the answer.

A trial was had in the circuit court before a jury. The jury after hearing the evidence returned a verdict for the plaintiff for the sum of $4,000.

The defendant filed a motion for a new trial, which being overruled, it excepted and has appealed to this court.

The record in this case contains over two hundred pages, and is filled with exceptions taken by the parties to the various rulings of the court during the progress of the trial. The instructions alone, to which exceptions are taken by the parties, cover twenty-two pages of the record, but with the view which I have taken of this case, it will only be necessary to notice a few points urged by the parties in this court.

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It appears from the bill of exceptions, that there is a large tract of land situate in the counties of Madison and St. Francois in this State, which is known by the name of the "Mine La Motte domain"; that the lands are mining lands; that in May, 1838, the owners of this tract of land, for the purpose of facilitating mining thereon, promulgated a set of rules and regulations for the government of their agent, who was to take charge of the mining operations, as well as for the government of those who should work the mines and take minerals therefrom. Each person who proposed to extract minerals from these lands was required to stake off the ground on which he proposed to work, and place objects at the corner, so as to plainly designate the land to be worked, and was compelled to sign his name to the rules and regulations promulgated. These rules, by their terms, were to go into operation on the 6th day of August, 1838, and it is agreed by the parties that they were, by their terms, to expire in ten years from that date. Portions of these rules and regulations were read in evidence by the plaintiff on the trial of the case, and are as follows:

"Article 1st. It shall be the duty of the agent of the La Motte mines and property to attend to the fulfillment of the following rules and regulations established for the interest of all whom it may concern."

"Article 2d. Persons desirous of mining, smelting, or transacting business within the limits of the La Motte domain, are requested to inform the agent of their intention. No person shall be permitted to commence operations without having his name to these laws."

Articles one and three of the second subdivision of these rules and regulations read as follows:

"Of smelting." "Article 1st. All ores found or extracted within the limits of the La Motte property shall be smelted upon said premises without contrary permission from the agent."

"Article 3d. No grant or permission shall be delivered, thereby empowering a person or persons to the privilege of smelting under these formalities, without such person or persons previously give bond conditioned with a penalty, and approved security, the refusal or acceptance of such security being at the option of the agent. The further condition of said

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bond shall be—a faithful account of the whole quantity of lead made shall be kept, and that he or they shall deliver or cause to be delivered to an appointed place or warehouse located on the premises, ten pounds of merchantable lead out of every hundred pounds made, such one tenth being the property, rent or tax due the company from those enjoying these privileges."

The signature of plaintiff is to these rules, but it is not shown at what time his name was subscribed.

The plaintiff also read in evidence from a book called "Register of Mine La Motte No. 3," the following entries: "1848, Aug. Those whose signatures are hereto annexed are permitted to mine upon the Mine La Motte domain, and raise any mineral contained under the surface thereof, conditionally that they sell no ores thus raised to any other persons than such as will smelt the same on the said domain. This agreement to be subject to and revocable by future action of the proprietors."

This register is signed by the agent of the proprietors, and it was shown that on pages succeeding, plaintiff's name was signed, not his own handwriting, but by his authority, thus: "Amos Lunsford, 1853." "August 9, 1856. Amos Lunsford."

Then the plaintiff, for the purpose of showing that the regulations under the "Register No. 3" still continued to be used in the year 1869, showed that in said book, after several blank leaves intervening between all other entries on the book and the one to be read, the name of the plaintiff appeared thus: "1869, Feb'y 16. Amos Lunsford & Co." This last signature was proven to have been taken from Lunsford at a school house, and was, by his authority, put on the book by a man who was only agent for a part of the proprietors and owners of the mine.

The evidence shows that plaintiff, together with two or three partners, commenced in the month of February, 1869, to take mineral out of the "Lunsford shaft," and between that time and the month of June in the same year took from said shaft several thousand dollars worth of mineral.

In June, 1869, Floming and others, owners of the mining lands, being about to sell out their lands, which included the lot in which the Lunsford shaft was sunk, gave Lunsford and other miners on the La Motte domain notice to cease mining,

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and yield up the possession of the lands used and mined by them to the owners of the land.

When this notice was given the miners all ceased work and abandoned their shafts, except one company, which remained for awhile with the consent of the proprietors.

Lunsford's partners abandoned the Lunsford shaft finally, and do not claim to have had any interest in the mine since.

Lunsford himself ceased mining, but gathered up and took care of the ore already mined. After the Lunsford shaft had thus remained unused from June until October, 1869, Radcliffe B. Lockwood, a part owner of Mine La Motte, having contracted to sell his interest in said lands to the defendant, and being desirous to have plaintiff quit the possession of the house in which he lived and the improvements connected therewith, again demanded the possession thereof in writing, and commenced a suit against him of unlawful detainer, after which plaintiff again commenced to dig and raise mineral out of the Lunsford shaft, and continued so to take the mineral from said shaft and deposit the same at the mouth thereof for some ten or twelve days, at which time he was enjoined from further operating said mine or shaft. After this injunction the defendant, by its agent—it having, as it claimed, become the owner of the "Mine La Motte domain," which it claimed to have purchased before the mineral sued for had been taken from the mine—took possession of the whole tract of land, including the "Lunsford shaft," and carried away and converted the mineral extracted from said shaft by plaintiff in the month of October, 1869.

During the trial of the case before the circuit court the defendant, in order to show its title to the land and mineral, read in evidence several deeds of conveyance by which said lands or interest therein were conveyed to it, and then offered to read in evidence a deed which purported to have been executed by one Radcliffe B. Lockwood, and by one Scott and his wife. This deed purported to convey to defendant a large and controlling interest in said tract of land, and was necessary to complete defendant's title thereto.

The deed was objected to by the plaintiff, on the ground that it was not under seal so far as Lockwood was concerned. The deed purported to have been executed under the hands and seals of all three of the grantors, but it had only two

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scrawls or seals placed opposite the names of the parties as they were subscribed to the deed, and these were placed opposite to the names of Scott and wife, and none placed opposite to the name of Lockwood. The court sustained the objection made to the deed, and refused to permit the defendant to read it in evidence as the deed of Lockwood, but permitted it to be read as the deed of Scott and wife.

To this action of the court the defendant excepted. The defendant had by other deeds shown that portions of the interest or title on the land had been vested in it, but the exclusion of this deed left a large, undivided interest, or title, to the land outstanding. Other evidence was given by the defendant tending to prove its title to the land and mineral, which need not be here referred to. The plaintiff claims that he was in the lawful possession of the mining shaft by virtue of having subscribed the rules and regulations of the proprietors of the land; that he, by signing the same, became their tenant or lessee, and as such was in possession of the shaft, and that when he extracted the mineral it became his property, and that he had therefore a right to recover against the defendant for its conversion, even if it should be proved that the defendant was the owner of the land where the shaft was made.

The defendant claims that the plaintiff was working in the mines under a revocable license, and that the license was revoked in June, 1869, by the notice served on him at that time by the proprietors of the land, in which the plaintiff and his partners acquiesced for several months, and that therefore when he commenced in October, 1869, to take out mineral against the will of the owners, he was a mere wrongdoer, and could not by his wrongful act acquire any title in the mineral so wrongfully extracted against the owners of the land; that the mineral so extracted still remained the property of the owners of the land.

The right of the plaintiff to extract and hold the mineral sued for must depend on the construction of the regulations and agreement under which he was mining, and under which he claims title.

The rules promulgated on the 19th of May, 1838, and which took effect on the 6th of August, 1838, expired on the 6th of August, 1848, unless they were continued in force by the after

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action of the parties; so that we must ascertain by what was done, after that time or at their expiration, how and by what right the plaintiff held and worked the "Lunsford shaft" in 1869. It will be seen that in August, 1848, just at the time the first rules promulgated were to expire, the "register of Mine La Motte, No. 3" was adopted by the agent of the company, and agreed to by such miners as subscribed the same. The plaintiff claims to have subscribed and agreed to this register at different times. It is to be supposed that these different signings related to different shafts or mines staked out by the plaintiff at different times; but he only read parts of the regulations in evidence. It can not therefore be clearly seen what was the object of these different signings by the plaintiff.

The mining register seems to have been a regulation made between the agent of the proprietors of the mines and those mining on the land at the expiration of the first regulations promulgated by the proprietors in 1838.

That part of the register read in evidence by the plaintiff read as follows: "1848 August. Those whose signatures are hereto annexed are permitted to mine on the Mine La Motte domain, and raise any mineral contained under the surface thereof, conditionally that they sell no ores thus raised to any other person than such as will smelt the same on the said domain. This agreement to be subject to, and revocable by, the future action of the proprietors."

This was signed by the agent of the proprietors and by the plaintiff. To properly construe this instrument we must keep in view the circumstances under which it was executed.

The proprietors had first promulgated rules and regulations for the miners, who, by signing the same, had a right to mine and extract minerals under their provisions for the term of ten years after August, 1838. At the expiration of this time the agent of the proprietors made an agreement, called the register No. 3, by which miners might continue to mine and open mines by subscribing this register or agreement, upon the condition therein stated. One of these conditions was, that the agreement was to be revocable by the future action of the proprietors.

The plain construction of this agreement seems to me to be that it was a revocable license, to be revoked at the pleasure of the proprietors of the land, and was not, as contended by

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the plaintiff, a lease. It was a mere permission to work the mines for an unlimited time, to be revoked by the proprietors at their pleasure. Such a license might be revoked at any time, and this seems to have been the understanding of the miners who signed the agreement, for it appears by the evidence that, out of over twenty miners working mines under this agreement in June, 1869, all ceased to work or claim any further right to work or extract ores from the mines after being notified to quit by the owners of the land in June, 1869; and in fact the plaintiff and his partners, on being notified to quit in June, 1869, ceased work, and the partners never resumed work or claimed any further right in the mines after that time. But the plaintiff in the next October, for some reason, resumed work and claimed the right to exhaust the mineral from the shaft where he had worked by virtue of his old license or agreement. After the plaintiff had been notified in writing, by the owners of the land, to quit working the mine, and yield up possession of the land in June, the license ceased, was revoked, and when he afterward, in the October following, resumed work and took out minerals without the consent of the owners of the land, he was a mere wrongdoer, and acquired no title to the mineral by such wrongful act.

The title to the minerals thus wrongfully extracted remained in the owners of the land, and it was the duty of the court to so tell the jury by a proper instruction. The main error of the court, however, was in excluding the deed offered in evidence by the defendant to show that it had acquired the title of Lockwood and Scott to the land from which the mineral had been extracted.

The deed was excluded as the deed of Lockwood, and as to his interest in the land, and the jury were instructed that the plaintiff could recover as to said interest, for the reason that the title to that extent was not shown to have passed to, or vested in, the defendant.

The case was tried upon the theory that the defendant had shown no title to Lockwood's interest in the land, and that therefore the plaintiff could recover for the mineral to that extent.

This deed ought to have been admitted in evidence; it purported to have been executed by all of the grantors; two seals or scrawls were placed at the end of their names. It is true

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that neither of the scrawls was placed opposite the signature of Lockwood, but the deed purported to have been executed under the hands and seals of all of the parties, and was acknowledged as the deed of all.

In such case it is not necessary that a separate seal should be placed to each name; if it appears that the seal affixed was intended to be adopted as the seal of each, it is sufficient. See the opinion of WALWORTH, Justice, in the case of *Townsend* v. *Hubbard*, 4 Hill, 351; *Tasker* v. *Bartlett*, 5 Cush. 359; Stark., Ev., by Sharswood, 508, and authorities there cited.

There are a great many other points made in the case, but the points referred to and passed on are sufficient to dispose of the case.

Judge ADAMS not sitting, the other judges concurring, the judgment is reversed, and the case remanded.

HARKNESS ET AL. V. BURTON ET AL.

(39 Iowa, 101. Supreme Court, 1874.)

License not revocable without compensation or notice. A parol license to mine is valid and can not be terminated without compensation to the licensee, or by the notice required to determine a tenancy at will; and such license is good against subsequent lessees or licensees having notice.

[1] **Mining, as notice.** Where parties have notice by the work done they will be charged with notice of all rights which the parties held who prosecuted the same.

[2] **Leaving tools upon the ground** considered as evidence against abandonment.

Mining on homestead. The wife's consent is not necessary to leases or licenses to mine or quarry minerals not incident to the enjoyment of the homestead.

[3] **Estoppel against feme covert.** The wife will be assumed to have consented when her knowledge is shown.

Appeal from Dubuque District Court.

This is an action in chancery, brought by plaintiffs to restrain defendants from mining lead ore upon certain lands in Du-

[1] *Chamberlain* v. *Collinson*, 9 M. R. 36.
[2] *Bell* v. *Bed Rock Co.*, 1 M. R. 45.
[3] *Tatham* v. *Lewis*, 6 M. R. 671.

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buque County. By a cross-bill defendants ask that plaintiffs may be enjoined from mining upon the same premises. The relief prayed for by the defendants was by the final decree granted. Plaintiffs appeal. Other facts necessary for the proper understanding of the points ruled are found in the opinion.

L. H. CADY, GRIFFITH & KNIGHT, for appellants.

H. T. MCNULTY, E. MCCENEY, for appellees.

BECK, J.

The abstract of the pleadings and evidence upon which this case is presented to us is quite considerable in extent, the printed arguments of counsel are exhaustive, able, and by no means brief, altogether presenting a voluminous mass of matter which we have considered with great care, and upon which we have reached a very satisfactory conclusion, as to the merits of the case and the rights of the respective parties. Having, in the great quantity of reading which the consideration of the case has imposed upon us, discovered the true points at issue, we find no difficulty in reaching conclusions both as to the facts and law of the case.

The facts of the case, briefly stated, are these. Plaintiffs had been for more than a year prosecuting explorations for lead ore upon the premises in dispute, under, as they claim, a license or parol lease of the owner, one Rittenhouse, and shortly before the commencement of this suit had struck a "crevice," or natural deposit of the mineral. The defendants were mining at the same time on an adjoining tract of land belonging to another proprietor. After sinking a "shaft" a sufficient distance, they began to "drift" toward the lands upon which plaintiffs were mining, and actually entered them, and then struck the same crevice or deposit of ore, which plaintiffs afterward reached by their excavations. Defendants claim the right to remove the mineral found by both parties under a license, and subsequently a written lease executed by Rittenhouse. Each of the respective parties claim the exclusive right to mine upon the land in question under the owner, Rittenhouse.

The sole question presented for our determination is, which

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possesses it. We will not enter into a protracted and unprofitable discussion of the evidence bearing upon the point in issue, but will content ourselves with stating briefly the conclusions we reach as to the controlling facts of the case.

1. We find that plaintiffs, in their own right, either as grantees or successors of others, long prior to the date of any license or lease from Rittenhouse to defendant, did obtain an exclusive mining license from him, covering the lands in question. This is indisputably established by direct evidence, and, in fact, is not directly denied by defendants. Some question is made as to the rights of some of the parties as successors of others, but that the plaintiffs had permission to explore and mine upon the land is not to be doubted. It is clearly established, though denied by defendants, that this license was exclusive. There is both direct and circumstantial evidence conclusively establishing this position.

2. It is claimed that the right thus acquired by plaintiffs was surrendered and the work abandoned, prior to the commencement of defendants' operations. Plaintiffs, it is true, during the summer of 1870, did suspend work upon the land. But it is satisfactorily established, by the preponderance of testimony, that this was done by the permission and assent of Rittenhouse, and with the express understanding that their license continued, under which they should renew their explorations in the fall; that such was the fact we have no doubt.

3. We entertain no doubt that defendants had both direct and constructive notice of plaintiffs' exclusive right to mine upon the land. There is positive evidence that they were so advised when they first obtained permission from Rittenhouse to run their "drift" upon his land, or at least they had information of him, from which nothing else could have been rationally inferred. But defendants deny this, and contradict the evidence by other proof. However, the fact is sufficiently established by other evidence, or rather notice to them must be inferred from other facts established by the evidence. When plaintiffs suspended work in the summer (and during that time defendants claim to have acquired the license from Rittenhouse) they left tools upon the ground; they had before this sunk a shaft within ten feet of the crevice, where the lead was afterward found, which was not two hundred feet from an-

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other shaft, which, at the same time, was worked by defendants, who could and did see the operations of plaintiffs all the while they were being prosecuted. This crevice was within the ordinary reach of "drifts," started from "shafts," such as plaintiffs had sunk within ten feet of it. If plaintiffs had a license to sink the shaft in search of mineral, the crevice was within the bounds to which they would have been expecting to explore by drifts. That they were at work in this shaft when defendants were at work in another within two hundred feet, is well established, and it is also proved that these shafts were in plain view of each other. Defendants had notice of the work, and they will be charged by the law with notice of all rights which plaintiffs held in its prosecution, or as resulting therefrom. Considering the direct evidence with the foregoing and other facts, we are well satisfied that defendants had notice of plaintiffs' exclusive right to mine in the locality where the mineral was found. After plaintiffs resumed work in the fall they sunk another shaft near the one just spoken of, in which they found the ore. Defendants, having notice of plaintiffs' rights, will continue to be charged with notice thereof until they are abandoned or terminated, or until some act of plaintiffs is done which will estop them to deny the abandonment of their rights. But no termination, abandonment or estoppel, is shown.

There is no proof that Rittenhouse has at any time taken steps to terminate plaintiffs' license. Under the well settled doctrines of this court, a parol license of mining lands is valid, and can only be terminated by compensation to the licensee or the notice necessary to terminate a tenancy at will: *Bush* v. *Sullivan*, 3 G. Greene, 344; *Beatty* v. *Gregory*, 17 Iowa, 109; *Anderson* v. *Simpson*, 21 Iowa, 399.

Such license is good against a subsequent lessee or licensee with notice. See *Beatty* v. *Gregory*, and *Anderson* v. *Simpson*, *supra*.

II. It is argued by defendants' counsel that, as it is shown, the lands upon which the mining was performed by plaintiffs and covered by the license are a part of the homestead of Rittenhouse, and as the wife did not join in the license, it is void. This position is untenable. We have never heard that a lease of lands not interfering with the possession thereof

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for the uses of a homestead, and licenses to cut timber, quarry stone or remove mineral and the like, may not be given by the husband without the assent of the wife. This certainly is so when the license in no way interferes with the homestead. Besides, if her assent be necessary to give validity to a parol license, it will be presumed, if she have full knowledge of work done or expenses incurred thereunder, and makes no objection, that she assented thereto. She could not stand by and see money and labor expended, and afterward, by proclaiming that she did not assent, rob the party incurring the expense of the fruit of his toil and outlays. In this case it is shown that plaintiffs expended, before they discovered mineral, $2,000, and that the wife of Rittenhouse had full knowledge of the work as it progressed, and had personal knowledge of the license granted by her husband to plaintiffs.

The foregoing views dispose of the case. We do not find it necessary to follow the learned and diligent counsel through the course of their arguments. In our opinion, the case stands upon the simple facts and plain principles of the law above stated. Our minds firmly and satisfactorily rest upon them.

The judgment of the district court is reversed, and a decree will be entered in this court, enjoining the defendants from removing the lead ore from the premises in question, and granting such other relief as the nature of the case requires.

Reversed.

COLE, J., non-concurring.

ON REHEARING.

PER CURIAM.—This cause was again submitted to the consideration of the court upon a petition for rehearing. We have given the case another careful examination, and have thoroughly considered the evidence again. While one member of the court, COLE, J., is unable to concur in the conclusions reached in the opinion heretofore filed, the others are content to abide by them, and adhere to the judgment rendered thereon. We find it unnecessary to add anything to what we have heretofore said in this case; our former opinion is refiled and adhered to.

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BRADLEY v. THE SOUTH CAROLINA PHOSPHATE AND PHOSPHATIC RIVER MINING CO.

(1 Hughes, 72. U. S. Circuit Court, District of South Carolina, 1874–77.)

[1] **Legislative charter, allowing mining from river beds.** An act of assembly of South Carolina of March 1, 1870 "gives and grants" to certain parties named "the right to dig, mine and remove," during twenty-one years, from the beds of navigable waters within the State, the phosphate deposits therein, requiring the grantees to pay a bonus of $500, and a royalty of $1 per ton. *Held*, upon bill filed by another company to which afterward similar privileges had been granted, that the former act conferred no *exclusive* privileges—distinguishing the case from *Massot* v. *Moses*, (8 M. R. 607), and following *Doe* v. *Wood*, (9 M. R. 182.)

In equity.

Bill for injunction, relief, etc.

BOND, J.

The bill in this case alleges that on the first of March, 1870, the General Assembly of the State of South Carolina passed an act entitled "An act to grant certain persons therein named, and their associates, the right to dig and mine in the beds of the navigable waters of the State of South Carolina, for phosphate rocks and phosphate deposits."

The act, by its first section, "gives and grants to the parties therein named, and to such other persons as they may associate with them," the right to dig, mine and remove for the full term of twenty-one years, from the beds of the navigable streams and waters within the jurisdiction of the State of South Carolina, the phosphate rocks and the phosphate deposits; and requires by its second section that they should pay the State one dollar per ton for every ton of such deposits or rock removed; and the third section of the act requires that the grantees file a bond in the penal sum of $500, conditioned that they should make proper returns of the amount of phosphatic deposits removed, and that they should pay into the treasury, before commencing business under said grant, the sum of $500 as a license fee.

[1] *Brandt* v. *McKeever*, 9 M. R. 216.

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The bill alleges the compliance of the parties with the terms of the grant, and asserts that by such compliance there was granted to the complainant and his associates the phosphate rocks and deposits themselves contained in the navigable waters of the State, for the term of twenty-one years, and that by virtue of said act they have exclusive right to dig, mine and remove such deposits.

The bill shows that, notwithstanding this, the General Assembly on March 9, 1871, by virtue of an act entitled "An act to charter the South Carolina Phosphate and Phosphatic River Mining Company," granted to the persons therein named and their associates, the right to dig and mine in the beds of the navigable streams and waters of the State for phosphate rocks and phosphate deposits, upon much the same terms as had been required in the first named act. Under this second act the last named company had proceeded to remove phosphates from the beds of the navigable waters in disregard of the exclusive right of the complainant.

The prayer of the bill is for subpœna and an injunction in the usual form.

The answer denies the exclusive right claimed by the complainant, and also the right of the complainant, Bradley, to sue in his own name, who does so merely upon an allegation that he, as a stockholder in the South Carolina company, had requested his associates in the company to litigate the matter in controversy, and upon its refusal had brought suit himself.

The question to be considered, which is decisive of the case, is whether or not the grant to the complainant's company, by the act of March 1, 1870, is a grant of an exclusive right to dig, mine and remove the phosphatic deposits in the beds of the navigable waters of the State.

The terms of a grant which are claimed to confer an exclusive right must be clear and explicit, and without ambiguity must plainly express the intention of the parties. The grantees can claim nothing which is not clearly given by the act.

The grant of the right to dig for and remove the phosphate rocks in a particular place, is the grant of an incorporeal right. It is the grant of a right to be exercised upon the soil of another, to exercise which, without permission, would be a trespass in the grantee; and unless there be words in the grant

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which clearly express the intention of the parties to convey the whole body of the mineral to be dug and removed, it does not convey a corporeal hereditament, or any right in the soil itself.

But even were the words "the right" to be held *prima facie* to grant an exclusive right, other words of the act of March 1, 1870, clearly show that this was not the intention of the legislature when it passed that act.

The grantees are not required by the act to pay for all the phosphate rocks in the beds of the navigable waters a gross sum, but are to pay the sum of one dollar per ton for every ton which they shall dig, mine and remove, which, it seems to us, is conclusive that this was not a sale of all the rocks, but was a sale of so much as the grantees should choose to mine and remove at that price. And when the second section of the act of March 1, 1870, provides that the grantees, before commencing, shall pay a license fee of $500 for the privilege granted, it clearly shows that it was the intention of the legislature to grant a mere incorporeal right, and that the title to the phosphate rock was in the grantee only upon digging and securing it.

Under the complainant's construction, he might hold possession of all the phosphate rocks of the State for twenty-one years without having paid one cent for them to the State; for he is to pay nothing before commencing business, and by the terms of the act it is at his option whether he will ever begin to dig or mine.

This case is easily to be distinguished from the case of *Massot* v. *Moses*, 3 S. C. 168, which is relied upon by complainant in support of his claim to an exclusive right.

In that case the court found words which gave the exclusive right. The grantor "sold and conveyed" the right and privilege of mining and removing all the minerals which the grantee himself found, or which were discovered by any other person upon the land. The grantee paid a sum in gross equivalent to the value of all the minerals supposed to be on the land. The court held that the words "that may be found by any person or persons, or contained in any part of the land," excluded the grantor himself, and showed an intent to convey an exclusive right; and this, taken in connection with the fact that the consideration paid was an entire sum upon the delivery of the deed, established the intention of the parties.

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But in the case before us there are no words used which, by implication, could exclude the grantor. There is no sale or conveyance, and no consideration paid, which could possibly be held to be the gross value of the phosphatic rocks in the beds of the navigable waters of the State.

It seems to us that this case falls precisely within the rulings of *Doe* v. *Wood*, 2 B. & Ald. 724.

The grantees, under the act of March 1, 1870, can claim nothing, as we said before, which is not clearly granted by it. They can not take anything by implication. Nothing passes but what, in explicit language, is given, and when the intention of the legislature is doubtful, the act must be construed against the grantees.

We think the injunction must be refused and the bill dismissed.

BOONE ET AL. v. STOVER ET AL.

(66 Missouri, 430. Supreme Court, 1877.)

[1] **License distinguished from lease.** An instrument in writing, under seal, granting permission to mine "so long as they do regular mining work on said lot" is a license, irrevocable except in case of breach, but is not a lease because it does not pass any such estate in possession as would entitle the grantee to maintain ejectment.

License misnamed lease, in the pleadings. In an action for breach of covenant for quiet enjoyment, the styling of an instrument as a lease when in fact a license, the contents of the instrument being known to the defendant, is not such a variance as to authorize a nonsuit.

Error to Morgan Circuit Court; Hon. GEORGE W. MILLER, Judge.

Action for damages for breach of an implied covenant for quiet enjoyment of a mining right, granted by an instrument under seal. At the trial plaintiffs were forced to take a nonsuit. Hence this appeal.

SPURLOCK & RICHARDSON, for the plaintiffs in error.

[1] *East Jersey Co.* v. *Wright*, 9 M. R. 332.

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1. Implied covenants for peaceable and quiet enjoyment arose from the instrument or lease. There can be no doubt of this, where rent was paid and received, as in this case: 4 Cruise's Digest, Title, Lease, p. 51, marginal 68; *Mack* v. *Patchin*, 20 How. Pr. 20; *Hamilton* v. *Wright*, 28 Mo. 199; *Vernam* v. *Smith*, 15 N. Y. 327; 2 Story on Contr., § 906. In this case the defendants had made a prior lease, under which the plaintiffs were evicted, and that of itself was a breach of the implied covenant.

J. L. SMITH, for defendants in error.

1. The mining permit, under which the plaintiffs entered into possession of the premises, does not contain any covenant for quiet enjoyment, nor any words from which the law will imply such covenant. The words "have permission" are neither a translation, nor the equivalent of the words *demisi*, *concessi*, and unless this is so, no covenant will be implied. There is none growing out of the simple relation of landlord and tenant: *Meader* v. *Carondelet*, 26 Mo. 112.

2. The instrument referred to is not a lease; it is a mining license: 1 Washburn, Real Prop., 148; *Cook* v. *Stearns*, 11 Mass. 533; Bainbridge on Mines, pp. 129, 39, 237, 269, 321; *Chicago Oil Co.* v. *U. S. Pet. Co.*, 57 Pa. St. 83; *Norway* v. *Rowe*, 19 Vesey, 158, 144; *Chetham* v. *Williamson*, 4 East, 464; *Doe* v. *Wood*, 2 B. & Ald. 724; *Thomas* v. *Sorrel*, Vaughan, 330.

NAPTON, J.

In this case we are under no necessity of referring to the distinction which is recognized, both in England and in this country, between parol licenses and licenses by deed, which in some cases is important. The distinction is clearly, though somewhat quaintly, explained by C. J. Vaughan, in *Thomas* v. *Sorrel*, (Vaugh. 351): "A dispensation or license properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, without which it had been unlawful; as, a license to go beyond the seas, to hunt in a man's park, to come into his house, are only actions, which,

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without license, had been unlawful. But a license to hunt in a man's park and carry away the deer killed, to his own use, to cut down a tree in a man's ground and to carry it away the next day after, to his own use, are licenses as to the acts of hunting and cutting down the tree, but as to the carrying away of the deer killed and the tree cut down, they are grants. So to license a man to eat my meat, or to fire the wood in my chimney to warm him by, as to the actions of eating, firing my wood and warming him, they are licenses; but it is consequent necessarily to those actions that my property may be destroyed in the meat eaten and in the wood burnt. So as, in some cases, by consequence, and not directly, and as its effect, a dispensation or license may destroy and alter property."

A license, therefore, which gives some usufruct of the land itself, is an incorporeal hereditament, and can only be created and transferred by deed: Bainbridge on Mines, 252. The deed produced in evidence, in the present case, was a license and a grant of an incorporeal hereditament. This deed, had it contained formal provisos and covenants, entered into by both parties, would have had the same effect as a lease, though not technically one: *Muskett* v. *Hill*, 7 Scott, 855; 5 Bing. N. C. 694. It was not revocable, because it was not simply a license which might be by parol, but was accompanied with the grant of a beneficial privilege in lands. It contains covenants on the part of the grantees to deliver weekly all minerals raised on the lot of the Granby Mining and Smelting Company, or their agents, at the current market prices, and to perform not less than twenty days' work every calendar month, unless prevented by sickness or unavoidable accident, and authorizes the Granby Mining and Smelting Company, by their agents, to inspect the work whenever they desire, and empowers such agents, when they are of opinion that said work is not done in a workmanlike manner, or when any other agreement or covenant of the grantees is not complied with, to re-enter and take possession of the mine, without resorting to any court of law or equity. On the part of the grantors the deed gives permission to plaintiffs, the grantees, to mine on the lot described in it, "so long as they do regular mining work on said lot." Being under seal, and granting, not merely a permission, but

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a beneficial privilege in the lot, it was not revocable except for breaches of the contract by the grantees. The grantors could not eject the grantees while the latter were doing "regular mining work." Mr. Bainbridge, in his work on Mines and Mining, observes that "It may be generally laid down that if it appear to be the intention of a deed of grant or license, that the grantee should be solely and exclusively entitled to work for mineral, the grantor will be afterward precluded from abridging or derogating from his grant by any attempt to exercise a right similar only in deed, but incompatible with his former disposition. This intention should properly appear in the granting part, for the use of the granting part is to give an accurate description of the thing granted. It is an essential part of the thing granted that it is freed from the interruptions and claims of others." Ch. 8, Sec. 4, p. 255.

Mr. Taylor, in his treatise on Landlord and Tenant, also makes a similar observation: "A license may have the force of a grant of an incorporeal hereditament, if it be valid and delivered; and if granted for a consideration, it may take effect as a covenant; as, if it authorizes the party to whom it is made to go upon the land of the party granting it, to use the land for his own profit, in which case it would be equivalent to a lease; or it may be limited to some particular purpose, as to cut wood, to draw water, etc.; and in either case would be supported as a covenant, and effect would be given to it in the same manner as any other contract." The thing granted in this case is the privilege of mining on a described lot so long as regular mining work is done by the grantees. It is essential to this that this privilege be not interrupted by others. So that, in effect, there is in this grant a covenant that the thing granted shall not be interrupted, although the word covenant is not used. An agreement, under seal, "for the performance or non-performance of certain acts, or that a given state of things does or shall, or does not or shall not exist," is a covenant, and the covenant is an express one, for express covenants are those created by the express words of the parties to the deed (Platt, Cov. 25), and the formal word "covenant" is not indispensably requisite for the creation of an express covenant: 2 Mod. 268; 3 Keble, 848; 13 N. H. 513; Bouvier, L. D., title, Covenant.

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These observations are based exclusively on the documents and other testimony submitted by the plaintiffs on the trial, but as the word "lease" and "leased premises" are occasionally used in the petition, and the question decisive of the case depends on whether there was a total failure of evidence to support the petition as it was drawn, it is proper to notice the characteristics which distinguish a lease from a license. A lease is defined in Cruise's Digest (Ch. 5, Vol. 4) as a contract for the possession and profits of land and tenements, on the one side, and a recompense or rent or other income on the other. The words "demise, lease and to farm let," are the proper ones to constitute a lease, but any other words which show the intention of the parties that one shall divest himself of the possession, and the other come into it for a certain time, whether they are in the form of a license, covenant or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease as effectually as if the most proper words had been used for that purpose: *Hamilton* v. *Wright*, 28 Mo. 199. By a lease, the lessee obtains an estate in possession of the land and its products, in respect to which he can maintain ejectment; but in a license or grant of an incorporeal hereditament, the grantor does not divest himself of the possession, and the liberty of working a mine or mines on it is not inconsistent with the retention of possession by the grantor.

The case of *Doe* v. *Wood* (2 B. & Ald. 724) explains this distinction. That was an ejectment, and brought on a mining license granted by deed. But the Court of King's Bench held that an ejectment could not be maintained on it, though the license was like the present, irrevocable. The chief justice (Abbott) observes in this case: "Instead of parting with or granting or demising all the ores, metals and minerals which were then existing within the land, its words import a grant of such parts thereof as should, upon the license to search and get, be found within the described limit; which is nothing more than the grant of a license to search and get (irrevocable indeed on account of its carrying an interest) with a grant of such of the ore as should be found and got, the grantor parting with no estate or interest in the land. If so the grantee had no estate or property in the land itself, or any particular portion

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thereof, or in any part of the ore, metals or minerals ungot therein; but he had a right of property only as to such part thereof as upon the liberties granted should be dug and got. That is no more than a mere right to a personal chattel, when obtained in pursuance of incorporeal privileges granted for the purpose of obtaining it, being very different from a grant or demise of the mines or metals or minerals within the land, and is such a right only as under the circumstances stated in the case is not sufficient to support an ejectment." It is conceded at the same time by the chief justice that an eviction by the grantor, or any one under him, would be wrongful, unless as authorized by the grant. The implied covenants in a lease are, that no person claiming through or under the lessor, or having a superior title to him, shall disturb the lessee in the quiet enjoyment and use of the premises leased, and a breach of this covenant occurs when the ouster is by one holding a prior lease: *Andrews* v. *Paradise*, 8 Mod. 318; *Salmon* v. *Bradshaw*, Cro. Jac. 304; *Ludwell* v. *Newman*, 6 Term, 458; Rawle on Cov., Ch. 6.

The writing obligatory then, produced on the trial, was beyond doubt a license and not a lease, and the only remaining question to be determined is, whether the deed and the accompanying proof on the trial was such a departure from the allegation of the petition as properly to subject the plaintiffs to a nonsuit.

The action in this case is for damages occasioned by a breach of covenant in a deed executed by defendants, which is said in the petition to be a lease or writing obligatory. The paper is alleged to be in the possession of the partner of one of the defendants, and the court is asked to make an order for its production in court. The defendants who executed the writing obligatory were fully apprised of what it contained, and the miscalling it a lease was of no consequence, provided it contained such stipulations or covenants as the plaintiffs charged that it did. The gist and entire scope of the action was to recover damages for the breach of a covenant, express or implied, in a writing obligatory, under which plaintiffs had taken possession of a mine and had expended labor in developing it. That the writing obligatory proved to be a license instead of a lease might have suggested the propriety of an amendment; but if the license contained the covenant sued on, the

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defendant was equally liable as though it had been a lease. Where one cause of action is stated in the petition and another proved, we are aware that under our code and the decisions on its construction the plaintiff is rightly nonsuited: 17 Mo. 585; 19 Mo. 30. But the cause of action here proved is essentially the one stated; it is the breach of a covenant in a deed. The deed is sufficiently identified, and the only objection to the petition is, that it gives the deed a wrong name. The covenant broken is in the deed produced.

Judgment reversed and case remanded. The other judges concur. *Reversed.*

THE EAST JERSEY IRON CO. v. WRIGHT.

(32 New Jersey Eq. 248. The Court of Chancery, 1880.)

[1] **License distinguished from grant.** A contract giving a party an exclusive right to dig ore in certain lands, no estate or interest in the land being granted, is a license, and not a grant or demise.

License defined. A license is an authority to go upon the land of the licensor, and do an act or series of acts there, but passes no estate or interest in the land.

When irrevocable. Unless coupled with an interest, or an equity has been created by acts done in pursuance of a license, a license is always subject to revocation in either of the following methods: (1) By the will of the licensor; (2) by the death of either of the parties; or, (3) by the conveyance of the land upon which it was intended to operate.

[2] **Abandonment by licensee.** Where a mining license is granted by a licensor, for the purpose of having his lands explored and their mineral resources developed, and it contains a provision that if the licensee concludes to abandon digging ore he shall notify the licensor, if the licensee, after making an opening in the lands and finding a large deposit of ore, does in fact abandon the enterprise, because the ore is comparatively valueless, he will be held to have abandoned the mine, though he gave no formal notice.

Idem—Conduct equivalent to notice. His conduct under such circumstances constitutes the best sort of notice.

[3] **There is no equity in the conduct** of a licensee who experiments, quits and begins not again, until another has succeeded.

On final hearing on bill and answer, and on cross-bill and

[1] See *Silsby* v. *Trotter*, 3 M. R. 137: *Sobey* v. *Thomas*, 4 M. R. 360.
[2] *Doe* v. *Wood*, 9 M. R. 182; *Johnstone* v. *Robinson*, 12 M. R. —.
[3] *Ernest* v. *Vivian*, 8 M. R. 205.

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answer, and supplemental bill and answer, and proofs under all the bills.

Mr. THOMAS N. MCCARTER and Mr. CORTLANDT PARKER, for complainants.

Mr. JOSEPH D. BEDLE, for defendant.

The VICE CHANCELLOR. (ABRAHAM V. VANFLEET.)

The controversy in this case is presented in a twofold aspect. The East Jersey Iron Company claiming to be in the rightful possession of an iron mine opened by them in certain lands located in the county of Sussex, have filed a bill, asking that the defendant, Wright, may be enjoined from asserting any right to the mine, or claiming any interest therein under a paper in their bill called a lease; and also that this paper may be declared to be of no force or validity against them, and ordered to be canceled.

Wright, by both answer and cross-bill, asserts that the paper which his adversaries seek to have adjudged worthless is not only valid and effectual, but confers upon him an exclusive right to dig ore in the mine in dispute, and, by his cross-bill, he asks that his adversaries may be restrained from all further working of the mine, and be decreed to surrender the possession of it to him, and to account to him for the ore they have taken therefrom. Wright has also filed a supplemental bill, which, under the conclusion I have reached upon the main issue, it is neither necessary to analyze nor consider.

It is thus seen that the litigants assert rival rights to take ore from the same mine. Each claims a superior and exclusive right. Both parties claim under John I. Williams, Wright's claim is founded on an agreement, under seal, made by John I. Williams with Abram Rude, bearing date March 24, 1857, whereby Williams, for himself, his heirs, executors, administrators and assigns, agreed with Rude, his heirs, executors, administrators and assigns, that he and they should have the exclusive right and privilege of raising and removing ores from certain lands belonging to Williams, situate in the township of Vernon, in county of Sussex, together with the privi-

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lege of entering into and upon said lands for the purpose of raising and removing ore, and also for the purpose of erecting such buildings and machinery as might be necessary for carrying on the mining business. Williams, in addition, granted to Rude the privilege of cutting timber for the use of the mine without charge. Rude agreed to pay Williams twenty-five cents a ton for all the good ore sold and removed from the mine by their joint consent. The agreement further provided that in case Rude should conclude to abandon getting ore he should give Williams notice.

Immediately after the execution of this paper, Rude says he made an opening in the lands described in it, about ten feet deep, exposing from twelve to eighteen feet of ore, and removed about ten tons of ore. He has dug no ore since, and no further mining operations have been carried on under his paper. None of the ore raised by Rude was sold. Neither Williams, nor those who have succeeded to his rights, have derived a penny's profit or advantage from the paper. Rude transferred his rights under this paper to John H. Brown, on the 13th of March, 1873, and Brown assigned them to Wright July 7, 1875.

The origin of the rights claimed by the East Jersey Iron Company, is an agreement made by John I. Williams with Oliver Ames, Oakes Ames, and Oliver Ames, Jr., bearing date the 5th day of April, 1860, whereby Williams agreed for himself, his heirs and assigns, to give the Ameses, their successors or assigns, the exclusive right to all the iron ore on any land owned by him (excepting only a right of Abram Rude to a shaft made by him, to the extent of such shaft on the surface of the ground), together with the right of digging and removing the same. The agreement also provided that the Ameses should have the right to erect such work and buildings as were necessary in conducting their business, and, in case they abandoned the mine, to remove their machinery; they were also given the right to use timber growing near the mine, for the purpose of timbering their shaft and other necessary purposes. It was also provided that, in case Williams sold any of his lands, he should reserve the minerals for the benefit of the Ameses. The Ameses agreed to pay twenty-five cents a ton for all ore raised and removed, to keep correct accounts of the quantity raised and removed, and to make semi-annual pay-

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ments. The agreement also required the Ameses to raise and remove fifty tons of ore annually, or to pay tonnage on that quantity, and in case that quantity was not raised or tonnage on that quantity paid, that the agreement should become void.

It is undisputed that the tonnage or royalty required by this agreement has been paid and accepted by the party entitled to it, and that whatever rights were created by it have, so far as they affect the lands in controversy, been transferred to the East Jersey Iron Company. The agreement was assigned to them in September, 1873. John I. Williams conveyed the lands containing the ore in dispute to his son, Isaac Williams, on the 12th of May, 1864. He took possession at once. John I. Williams died subsequently. After the East Jersey Iron Company acquired the rights conferred upon the Ameses by this agreement, they entered upon the lands containing the ore in dispute and proceeded to develop a mine. They expended a considerable sum of money in its development, and they have established the fact that the mineral deposit in these lands is valuable both in respect to its quality and quantity. Their possession and mining operations must, in this controversy, be assumed to have been lawful, and rightful against everybody except the parties to this suit, who challenge them, and claim that they were invasions of their rights. They must be assumed to have been rightful against the owner of the land.

This brings us to the decisive question of the case: What is the legal operation of the Rude agreement? Is it a grant, a lease, or merely a license? The language, it will be observed, is purely promissory or executory: "It is agreed that Rude and those who succeed to his rights, shall have the exclusive right and privilege, etc." Nothing passes presently as under technical words of grant, *dedi et concessi*. To constitute a grant, it is not indispensable that technical words shall be used, but they must be words which will manifest the same intention. No such words are found here. The language of this instrument is equally inefficacious to manifest a purpose to make a demise. The technical words of a lease are "demise, lease, and to farm let;" but any other signifying the same intention will have the same effect. But they must clearly show that the lessor intends to divest himself of possession and that the lessee shall come into it.

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In *Doe* v. *Wood*, 2 Barn. & Ald. 724, the instrument employed was a deed, and by it the grantor granted unto the grantee and his assigns free liberty, license, power and authority to dig, raise, mine and sell all metals and minerals whatsoever, which should be found in certain lands of the grantor. It was held that the deed merely granted a license to dig ore, and to take such as the licensee should separate from the freehold, but that the grantee acquired no estate in the land nor in the ore deposited therein until he had severed it from its connections.

The instrument used in *Funk* v. *Haldeman*, 53 Pa. St. 229, was a deed by which the grantor bargained and sold unto the grantee and his heirs the free and uninterrupted use and privilege of entering upon the lands of the grantor, to prospect and dig for ore and to take and sell the same. This language, it was held, amounted neither to a lease nor to a sale of the land, nor to a sale of any of the minerals in the lands. Many other adjudications adopting the same construction might be cited, but the meaning of instruments couched in such language can scarcely be regarded as a debatable matter.

By force of the words of the instrument under consideration, unless we attribute to them a significance much more extensive than that they have in legal science, or can have in virtue of their own intrinsic force, it is plain they pass no estate or property in the lands or the minerals deposited in them. They at most merely gave Rude authority—we may say exclusive authority—to enter upon the lands of Williams and to do a series of acts there for his own profit, without passing any estate or property in the lands. Such an authorization is a license and not a lease: *Richman* v. *Baldwin*, 1 Zab. 395; *Cook* v. *Stearns*, 11 Mass. 537; 3 Kent's Com. 452.

"A license to work a mine," says Bainbridge, "differs from a lease in this: A license simply confers a right of property in the minerals when they have been severed from the freehold; while a lease is a conveyance of an actual interest in the thing demised." Bainb. on Mines, 117. The Rude agreement, in my judgment, simply conferred a license.

A license pure and simple is a mere personal privilege; it doth extend but to him to whom it was given, and can not be granted over: *Prince* v. *Case*, 10 Conn. 375; *Jackson* v. *Babcock*, 4

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Johns. 418; *Howes* v. *Ball*, 7 Barn. & Cress. 481. Even when money has been paid for it, it is revocable at law, at the pleasure of the licensor: *Hetfield* v. *Central R. R. Co.*, 5 Dutch. 221; S. C. Id. 571. The death of either of the parties will terminate it: *Johnson* v. *Carter*, 16 Mass. 443; *Ruggles* v. *Lesure*, 24 Pick. 187. Even when under seal, the licensor may revoke it at will: 2 Am. Lead. Cas. 376; *Wood* v. *Leadbitter*, 13 M. & W. 345; and when it affects lands, a conveyance of them will revoke it: *Cook* v. *Stearns*, 11 Mass. 538; *Stevens* v. *Stevens*, 11 Metc. (Mass.) 251; *Wallis* v. *Harrison*, 4 M. & W. 538.

This rule does not, however, apply when an interest is coupled with the license, or an interest is created by an execution of the license. To illustrate: If A sells a chattel situated on his lands, he may by express words authorize the purchaser to enter and remove it, or permission to do so will be implied necessarily from the transaction. In either case the license to the purchaser to go and remove his property is irrevocable, otherwise the vendor might, by simply exercising his power of revocation, defeat a title he had just made. And so a license giving the licensee the right to cut a tree on the land of the licensor, and carry it away, or to dig ore in his mine and remove it, becomes irrevocable after the tree is cut or the ore is dug, otherwise the licensor might practice a ruinous fraud upon his licensee, by exercising his power of revocation at that point in the transaction where he would derive the most advantage himself and inflict the greatest injury upon his licensee. Except in these cases and others like them, where it appears that the authority or privilege given has been so far executed that its withdrawal will amount to a fraud, a license, whether created by parol or by writing under seal, is always subject to be revoked in either of the modes already indicated. Under our system of real property law, no other rule can be tolerated. Even when this court interferes to prevent the revocation of a license partially executed, it gives relief only upon equitable terms: *Trenton Water Power Co.* v. *Chambers*, 1 Stock. 471.

The adjudications upon this subject are numerous and discordant. Taken in their aggregate they can not be reconciled, and if an attempt should be made to arrange them into har-

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monious groups, I think some of them would be found to be so eccentric in their application of legal principles, as well as in their logical deductions, as to be impossible of classification. But the doctrine just stated, I think, must be regarded as the plain result of the decided weight of authority, and as a necessary and natural sequence of certain established principles of real property law: 2 Am. Lead. Cas. 738 *et seq.*; *Thomas* v. *Sorrel*, Vaugh. 351; *Wood* v. *Leadbitter*, 13 M. & W. 845; *Funk* v. *Haldeman*, 53 Pa. St. 229.

A license may confer either a sole or exclusive right, or simply a right in common. If it simply confers a right to dig and take ore, or to work a mine, it is not exclusive, and the licensor may himself take ore from the same land or mine, or license others to do so. And when it authorizes the licensee to dig and carry away all the ore to be found in certain lands, it does not confer an exclusive right. If it be merely a license, and no estate or property in the land is passed, the licensee acquires no title to the ore until he has severed it. Such a license has been adjudged to confer a privilege similar to a right of common *sans nombre* to give a right without stint as to quantity, but not exclusive of the grantor. The authorities supporting this view will be found cited in *Silsby* v. *Trotter*, 2 Stew. 223. There can be no doubt that the instrument under consideration conferred an exclusive right. The licensor has expressed his intention in that respect in plain words. He agreed that Rude should have the exclusive right and privilege of raising and removing ore. This unquestionably gave Rude an exclusive right so long as his license continued in force. It may be laid down as a general rule that if it appears to be the intention of a deed of grant or license that the grantee should be solely and exclusively entitled to work for minerals, the grantor will be precluded from afterward abridging or derogating from his grant by any attempt to exercise a right incompatible with his former disposition: Bainb. on Mines, 269. But did Rude's license continue in force after Williams parted with the lands upon which it was intended to operate? No reservation of his rights was made; at least none has been shown. By force of his license he acquired no estate, interest or term in the lands. His right consisted of a bare, naked authority to go upon them and dig and remove

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ore. He had no possession, and was invested with no right to possession, which was sufficient to be the foundation of an action of ejectment. His license was unexecuted; he obtained it without paying a consideration for it, and had done nothing under it which rendered its revocation, either as a matter of law or conscience, unfair or unjust. If his license invested him with no estate or interest in the lands, and no equities have been raised in his favor by the expenditure of money or labor under it, it is difficult to understand by force of what legal or equitable rule it can be said to possess the least efficacy after the person who granted it has ceased to have any interest in, or dominion over, the lands upon which it was intended to operate.

It seems to me to be incontestably true, as a legal proposition, that the moment a licensor divests himself of his whole estate in the land, and his dominion over it ceases, any permission or authority granted by him to do acts upon the land, not resting in grant or demise, nor coupled with rights or equities arising out of acts done in pursuance of such permission or authority, must also cease.

But a more decisive consideration remains to be noticed. The Rude license was conditional; if he concluded to abandon the getting of ore he was to give notice. This provision, as well as the general scheme of the instrument, shows that it was the intention of the parties that the continuance of Rude's privilege was to depend on the fact that he dug and removed ore. It is clear that the rights and relations of the parties were not to remain the same after notice that they were before notice; the notice was not intended to be an unmeaning ceremony, which should leave the parties just where they were before it was given, and yet it is not expressly said that the effect of the notice should be to end Rude's privilege. Such, however, was undoubtedly the meaning of the parties. If we pay any attention to the general design of the instrument, the nature of the property which was the subject-matter of the arrangement, the situation and relation of the parties, and the character of the privilege granted, it is impossible to believe that Williams intended to give to Rude an exclusive and irrevocable privilege to take ore from his lands, which Rude might exercise or not, just as he pleased, and if he chose not to exercise it, that his arbitrary choice in the matter should have

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the effect of preventing Williams forever from developing the mineral resources of his land. Williams' object was undoubtedly just the reverse of this. His purpose was to have his lands explored and their mineral resources developed, not to grant a privilege which could be used to clog their development. That Rude understood that this was Williams' purpose, I think there can be no doubt. The discovery and mining of ore was manifestly the design of both parties, and their contract relations and duties were to cease when that purpose was abandoned. Rude had a right to terminate the arrangement at any time, after he had concluded to abandon the getting of ore, by notice either verbal or written. Abandonment was the essential operative fact, not notice. That was merely the means by which the fact of abandonment was to be communicated to Williams. Rude could not abandon the getting of ore and still retain his privilege. His right did not depend upon his will, but upon the fact that he dug and removed ore. His contract gave him no right to say, "I will abandon the getting of ore for the present, but not finally; I may resume after the lapse of ten or fifteen years." A failure to take any ore for that period was abandonment, unmistakable and absolute. The continuance of his license depended on his acts and not on his will, and in trying to ascertain whether he concluded to abandon the getting of ore or not, his conduct, and not his words or mental purposes, must be the test.

Upon the facts as he states them himself, there is no room for dispute or diversity of opinion. As already stated, in 1857 he made an opening about ten feet deep in the lands covered by his license, and removed about ten tons of ore, and then abandoned work, and has done nothing since. He found ore in abundance, but of a kind then regarded as comparatively valueless. He abandoned the enterprise because it was profitless. There can be no doubt about what his conduct meant. It was of itself, and in itself, actual, open and notorious abandonment, and amounted to notice of the most emphatic sort. In my view there is little appearance of justice in the claim that now, since a similar enterprise, undertaken at the risk of other parties and carried on with their money, has been made successful, those who claim to have succeeded to Rude's position should be permitted to come in and repudiate his abandonment,

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and set up a stale right and take to themselves the whole profit of the venture.

Said Lord Eldon, in *Norway* v. *Rowe*, 19 Ves. 144: "A licensee who stands by and suffers another to incur great expense and risk in developing a mine, without asserting any claim until the experiment has proved a success, presents a claim not to be admitted in a court of equity." "A mine," he further said, "frequently remains in the most hopeless state for years and may at last be rendered profitable by an adventurous speculator. Such speculations are always very hazardous. Perhaps when you think you have a golden prospect the whole thing fails. I have known a copper mine, producing one week at the rate of £20,000 a year and the next week worth nothing. There are persons who will stand by and see large expenditures incurred in such operations, intending if the venture turns out successful to set up a claim, but if otherwise to have nothing to do with it. Such persons have no right to the aid of a court of conscience."

In my judgment the Rude license is without any virtue or force whatever, having been revoked by the licensor and abandoned by the licensee. The East Jersey Iron Company are entitled to a perpetual injunction, and the cross-bill of Wright must be dismissed. The East Jersey Iron Company are entitled to costs on both decrees.

1. A license given is presumed to continue until revoked: *Keeler* v. *Green*, 21 N. J. Eq. 27; *Post* QUARRIES.

2. A privilege in a lease to the lessee of doing such quarrying on the demised premises as was necessary to carry on his business as a boat builder, *held*, to confer a property in the rock quarried: *McKee* v. *Brooks*, 20 Mo. 526.

3. A license from the Crown to dig minerals in granted land, where the mines are excepted out of the grant, will not justify an injury to the surface soil: *Gesner* v. *Cairns*, 2 Allen (N. B.), 595.

4. One tenant in common of coal mines may license another to get coals: *Job* v. *Potton*, L. R. 20 Eq. 84; *Post* TEN. COM.; *contra*, *Murray* v. *Haverty*, 70 Ill. 318; *Post* TEN. COM.

5. Covenant by licensees to pay compensation for damage to surface, *held*, to be a covenant running with the land which would bind their assignees: *Norval* v. *Pascoe*, 34 L. J., Ch. 82.

6. The word "void" in a license construed to mean "voidable": *Roberts* v. *Davey*, 4 B. & Ad. 664; 1 Nev. & Man. 443.

7. A license to search for, raise and carry away minerals, may be assigned: *Muskett* v. *Hill*, 5 Bing. N. C. 694; 7 Scott, 855.

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8. Distinction between grant and license: *Bracken* v. *Rushville Co.*, 8 M. R. 273; *Worcester* v. *Green*, 2 Pick. 425.

9. One working mines under an agreement revocable at the will of the owner, holds under a mere license: *Lockwood* v. *Lunsford*, 7 M. R. 532.

10. License must be specially pleaded: *Alford* v. *Barnum*, 45 Cal. 482; *Post* MINERAL LANDS. It is a defense to action of trespass: *Kamphouse* v. *Gaffner*, 2 M. R. 257.

11. License defined: *Caldwell* v. *Fulton*, 3 M. R. 238.

12. Grant to inhabitants of a town, of the right to take stone, construed as a license: *Worcester* v. *Green*, 2 Pick. 426.

13. Whether parol license, indefinite as to time, may be treated as a lease for one year, *query: Clegg* v. *Jones*, 7 M. R. 572; and see *Ganter* v. *Atkinson*, 9 M. R. 13; *Moore* v. *Miller*, 8 Pa. St. 272.

14. Lease distinguished from license: *Harlan* v. *Lehigh Co.*, 8 M. R 496.

15. License, how created: *Kamphouse* v. *Gaffner*, 2 M. R. 257.

16. Digging stone for more than twenty years under continuing license, does not enlarge the nature of the original privilege: *Rex* v. *Trent Nav. Co.* 4 B. & C. 57.

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GRANBY MINING AND SMELTING COMPANY, Appellant, v. TURLEY, Respondent.

(61 Missouri, 375. Supreme Court, 1875.)

Tributer's lien on ore—Lien in the miner—Title in the operator. The owner of lands set apart certain lots to tributers, who were to receive a certain weight in lead for a certain weight in ore brought to bank, or cash, at their election. The contract specially provided that no interest in the ore should vest in the miners. *Held*, that the miners had no title in the ore and no right to sell it, but that they had a lien upon the ore and the right to retain possession till the compensation was paid or tendered.

Appeal from Jasper County Circuit Court.

H. H. HARDING, for appellant, cited *Lunsford* v. *LaMotte Lead Co.*, 54 Mo. 426.

G. I. VAN ALLEN, for respondent.

WAGNER, Judge, delivered the opinion of the court.

This action was brought by the plaintiff to recover the possession of a quantity of lead mineral. The cause was submitted to the court on an agreed statement of facts, and there was a judgment for the defendant, from which plaintiff appealed.

It is agreed by the parties that the lead ore or mineral, which is the subject of controversy, was dug up and taken from land belonging to and which was the property of the plaintiff and in its possession, by certain miners, who dug the same under the terms and conditions of a contract entered into between them and the plaintiff. The contract is set out and made a part of the agreement, and by its terms it is shown that plaintiff set apart and permitted each of the miners to have certain lots of mineral land, and that the miners agreed to deliver to the plaintiff, weekly, all minerals dug, mined or raised from the mining lots, and that they would not remove any such mineral from the mining lots, nor permit it to be taken therefrom, or delivered to any other person or persons.

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The plaintiff agreed, as a full compensation for the working of the mining lots, to deliver to the miners at the nearest furnace of the plaintiff four hundred pounds of smelted lead for each thousand pounds of first class merchantable lead mineral, or the cash value thereof, according to the election of the miners, subject to a deduction, however, of $4 for each thousand pounds of mineral lead so raised. The contract then contains this express stipulation: "No right, title, or interest of, in or to any land, ores or minerals, is hereby granted or conveyed; and it is hereby expressly agreed and understood, that all ores or minerals, whether the same remain in the ground, or be severed or removed therefrom, is and shall remain in every event the absolute property of said company, and that the lead delivered or the money paid to the said parties of the second part, respectively, is not and shall not in any event be considered as the price paid for minerals or ores, but is, and in every event shall be, only compensation for labor and services rendered by the said parties of the second part, respectively, in working said mining lots." It is further agreed between the parties that the plaintiff performed all its part of the contract, and that the defendant purchased the lead mineral and ore from the miners for a round price, and the same was delivered to the defendant by the miners, and that the defendant at the time of the purchase had full notice of the contract between the plaintiff and the miners, and that he had knowledge of the fact that the lead ore and mineral was dug and taken under the contract by the miners from plaintiff's lands.

The only question is, whether the miners, when they dug the ore from the plaintiff's land, acquired any title to it; if they did, then their sale to the defendant was simply a violation of their contract with the plaintiff, for which they would be responsible in damages, but the rights of the defendant would not be affected.

That the ore or mineral originally belonged to the plaintiff is beyond doubt; and had it been taken without any authority, as by a trespasser, no title would have passed thereby; but the contract was the authority to the miners, and by that contract their rights and the nature and the extent of the property they acquired in the ore and mineral, must be determined. They were to dig it up and deliver it to the plaintiff for a certain and definite

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compensation. That there should be no mistake or misunderstanding, however, in reference to which party possessed the title, and whose property the ore continued to be, an express stipulation was entered into. That stipulation bound both parties, and is precise and unambiguous, and can not be misconstrued. It provides that no right, title or interest to any of the ores or minerals shall vest in the miners, but that the same shall remain as the absolute property of the plaintiff. An agreed compensation was to be paid to the miners for the amount of ore or mineral they dug up and delivered, and that was the whole measure of their rights. It is evident, therefore, that they acquired no title to the ore; they had a lien upon it, and could not be compelled to part with the possession, or deliver it, till the compensation to which they were entitled was paid. No right of property passed by the arrangement, and none was intended to pass.

The effect of the agreement was that plaintiff should furnish certain property upon which the miners were to do a prescribed amount of work and receive a certain stipulated sum therefor. When they performed the work upon the property their right to receive the pay became absolute, and they could not be forced to part with the possession till payment was made; but when payment was made or tendered, then all control over the property on the part of the miners ceased. They never possessed any right or title in the mineral apart from their lien, and therefore they could neither sell nor convey it. The defendant purchased with a full knowledge of all these facts, and therefore stands in no better position than the miners would have occupied had they retained the possession.

For these reasons the judgment should be reversed and the cause remanded.

All the judges concur, except Judge VORIES, who is absent.

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BEATTY'S APPEAL.

(3 Grant's Cases, 213. Supreme Court of Pennsylvania, 1857.)

[1] **Lien not affected by sale of partner's interest.** Miners' wages by statute are a lien upon their debtors' property; but when a firm is the debtor, a judicial sale of the separate interest of one partner does not entitle the miners to preferred payment out of the money so made, because it does not affect nor divest their miner's lien.

Where a creditor's lien is not divested by a judicial sale, he has no claim on the proceeds.

Appeal of Elizabeth M. Beatty and of Charles Haesler from the decree of the Court of Common Pleas of Schuylkill County, distributing the proceeds of the sheriff's sale of the personal property of John S. Struthers.

John S. Struthers and O. H. P. Reed were copartners in trade as J. S. Struthers & Co., and as such were the lessees of a coal mine, called the Diamond colliery, in Tuscarora, in Schuylkill county.

On the 18th day of April, 1855, a judgment was entered on a judgment note in the Court of Common Pleas of Schuylkill county, in favor of Elizabeth M. Beatty, against John S. Struthers, for $612.12, and on the 12th day of May, 1855, a judgment was entered on a judgment bond in favor of Charles Haesler, against John S. Struthers, for $2,000.

On the 29th day of May, 1855, writs of *fi. fa.* were issued on these judgments, under which the sheriff levied upon and sold the interest of John S. Struthers in the partnership property of the firm of Struthers & Reed, for $1,900; and also individual property of John S. Struthers to the amount of $252; the execution of Elizabeth M. Beatty having the precedence, having been first delivered to the sheriff.

At the time of the sale, the firm of J. S. Struthers & Co. were indebted to miners and laborers, for work done for the firm at the Diamond colliery, to the amount of $4,493.15.

The miners and laborers claimed that the proceeds of the sales should be applied to the payment of their claims against the firm. The execution creditors claimed the proceeds as

[1] *Ward's App.*, 5 M. R. 666.

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being the value of the interest of John S. Struthers in the firm, subject to the payment of the partnership debts, which included the claims of miners and laborers. The sheriff paid the money into court. An auditor was appointed, who distributed the proceeds of the sale of the interest of John S. Struthers in the firm of Struthers & Reed among the miners and laborers, as well as the proceeds of the sale of the individual property of John S. Struthers.

The execution creditors filed exceptions to the report of the auditor. The court overruled the exceptions and confirmed the report of the auditor, from which judgment this appeal is made.

EDW. OWEN PARRY, for appellant.

F. W. HUGHES and MYER STROUSE, for appellee.

The opinion of the court was delivered April 4, 1857, by WOODWARD, J.

We give full effect to the third section of the act of assembly of 2d April, 1849, for the protection of miners, mechanics and laborers, when we treat their claim as a preferred lien against the debtor's goods, to be satisfied out of the proceeds of a sale upon execution like a landlord's rent, before the execution creditor can take anything. Their lien is against their debtor's property. Now. who were the debtors of these miners? Struthers and Reed confessedly. Was there a sale of the property of Struthers and Reed on the execution in question? It can not be pretended; for an execution against one of several partners does not sell any part of the partnership effects, but only the contingent interest of the partner in the final balance, after all partnership debts are paid: *Doner* v. *Stauffer*, 1 Pen. & W. 198; *Deal* v. *Bogue*, 20 Pa. St. 233. It was not in this case, even in point of form, a sale of anything more, for the levy was upon the right, title and interest of John S. Struthers in the partnership effects. The liens of the partnership creditors were unaffected by such a levy and sale, and where a creditor's lien is not divested by a judicial sale he has no claim on the proceeds. The miners had all the rights they ever had—all that the act of assembly intended to give them—after the sale as fully as before. It would en-

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danger the interests of laborers to hold them entitled to the proceeds of the sale of a partner's interest, where a partnership was their debtor, because this would make every such sale divest their lien against the property of the partnership, which is the essential element of their security.

A difficulty is suggested in argument not applicable to this case, but which might arise where the interests of both partners should be sold at the same time for their separate debts. What would become of the rights of laborers in such a case?

It is not necessary now to answer this question, but I have no doubt the courts would have power under the act of assembly which gives them "the supervision and control of partnerships," to protect the rights of partnership creditors in such a case.

However this may be, these miners had the remedy in their own hands; for the partnership property, which was their security, survived the sale, and they should have looked to that rather than to the price which the contingent interest of one partner therein brought at the sale.

And now, April 4, 1857, this cause having been fully heard and considered, it is ordered and adjudged that the decree of the Court of Common Pleas of Schuylkill county be reversed and set aside, and that the fund in court be distributed first to the satisfaction of the execution of Elizabeth M. Beatty, and the residue thereof to the execution of Charles Haesler, and that the appellees pay the costs of this appeal.

TIBBETTS v. MOORE ET AL.

(23 California, 208. Supreme Court. 1863.)

Sufficient description of quartz mill. A lien notice describing the property as a "quartz mill, being at or near the town of Scottsville, in Amador county, known as Moore's New Quartz Mill," *held*, sufficient, there being no evidence of any other mill at that place so designated.

Definite description essential in the decree. Where a lien notice designated the ground around the mill sought to be covered in general terms the decree may properly be made to define it specifically, and in default thereof the purchaser might be held to take no land beyond that covered by the buildings.

Delivery of materials. Materials may be held to be "furnished" when

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delivered, though not at the building for use in which they are intended.

[1]**Intervening lien claimants.** Lien claimants appearing in obedience to the statutory notice to present their proof of lien, are not governed by the strict rules of intervenors.

Defects in the petition of an intervenor in summary proceedings under the Mechanics' Lien Law should be taken advantage of by demurrer.

Variance as to party furnished. Where a lien notice stated that materials were furnished to Moore & Co., and the building was, in fact, owned by Moore alone: *Held*, that the material fact was, that the materials were furnished for and used in the construction of the building in question, and that the lien could be enforced against Moore.

[2]**Mortgaged boiler attached to mortgaged realty.** The owner of a quartz mill mortgaged the same to B. Afterward he bought an engine and boiler, gave a chattel mortgage for the purchase money, and then transported them to his mill in another county and affixed them to the realty. *Held*, that the mortgage of the vendor had priority over the mortgage of B. notwithstanding this machinery became part of the realty.

Appeal from the Sixteenth Judicial District, County of Amador.

Moore, the mortgagor, purchased the steam engine spoken of in the opinion, of Lambard, its manufacturer, in Sacramento City.

The other facts are stated in the opinion of the court.

JOHN W. ARMSTRONG, for appellants.

R. M. and N. C. BRIGGS, for respondents Morgan and Weatherwax.

JOHN H. FRY, for respondent Tibbetts.

JOHN G. HYER and JOHN H. FRY, for respondent Lambard.

CROCKER, J. delivered the opinion of the court, NORTON, J, concurring.

This is an action to enforce a mechanic's lien, notice of which was filed in the recorder's office, November, 24, 1860, on a quartz mill owned by the defendant Moore, in Amador county, for machinery used in the construction of the mill.

[1] For practice under Lien Act see *Van Winkle* v. *Stow*, 23 Cal. 457.

[2] See *Roberts* v. *Dauphin Bank*, 6 M. R. 54; *Hendy* v. *Dinkerhoff*, 57 Cal. 3; *Thomas* v. *Davis*, 76 Mo. 72; 43 Am. R. 756.

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Morgan and Weatherwax came in under the published notice, and filed liens on the same property for lumber furnished and labor performed on the mill. Brown and Andrews were made parties, they claiming a lien thereon under a chattel mortgage, executed by Moore to one Mosick, and by Mosick assigned to them. This mortgage bears date October 22, 1860, was recorded the same day, and includes the quartz lode and the quartz mill then in process of erection, with the boiler, engine and other machinery used in the mill. Lambard is also made a defendant, he claiming a lien under a chattel mortgage on the boiler, engine, and fixtures connected therewith, executed by Moore on the sixteenth day of November, 1860. The property described in this mortgage was then in Sacramento, where the mortgage was executed, but was afterward removed to and put up as a part of the fixtures and machinery of the quartz mill. This mortgage was duly recorded in Sacramento county, November 17th, and in Amador county, November 19th. The case was tried by the court, and a decree rendered that the claim of Lambard was a valid, subsisting lien upon the property described in his mortgage, for the sum of eight hundred and twenty-two dollars and five cents; that the mortgage of Brown & Andrews was a valid lien against the property described therein for three thousand nine hundred and thirty-eight dollars and sixty-six cents, and that they have a further lien for two hundred and eighty-seven dollars and eighty-six cents for money paid by them for taxes and other expenses about the property. It was further decreed that the property mentioned in the Lambard mortgage be sold, and out of the proceeds the sheriff to pay—first, the cost and expenses of the sale; second, the costs and expenses of the action, and the two hundred and eighty-seven dollars and eighty-six cents advanced by Brown & Andrews, if sufficient to pay them and the debt due Lambard; third, to pay the amount due said Lambard; fourth, the overplus, if any, to be added to the proceeds of the sale of the property described in the mechanics' liens. It also decreed that the property described in the mechanics' liens should then be sold, subject to the rights of the purchaser under the Lambard mortgage, and from the proceeds, with any overplus from the first sale, after deducting costs and expenses of sale, to pay to the holders of the mechanics' liens the respective amounts due

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them under the decree, and, if sufficient, to be divided *pro rata* among them; but if there should be a surplus, the same to be added to the proceeds of the sale of the property described in the Brown & Andrews mortgage. It is also decreed that the property described in the Brown & Andrews mortgage should then be sold, subject to the rights of the purchasers at the two prior sales, and out of the proceeds to pay the amount due on that mortgage, and the overplus, if any, to the defendant Moore; and in case of a deficiency in the payment of said several debts, judgment to be entered for such deficiency against him, and that executions issue thereon. From this decree Brown & Andrews alone appeal.

The first point urged is, that the notice of lien filed by the plaintiff Tibbetts does not correctly or sufficiently describe the property sought to be charged with the lien. It is described as a "quartz mill, being at or near the town of Scottsville in Amador county, known as Moore's New Quartz Mill." There was no evidence that there was any other quartz mill at that place so designated as to render it uncertain which was intended. The description we deem sufficient to identify the property and uphold the lien: *Hotaling* v. *Cronise*, 2 Cal. 63.

The land around the mill is described in the complaint and notice of lien as follows: "With such convenient space of land around the same as may be required for the convenient use and occupation thereof." It is objected that this description is also insufficient. Sec. 4 of the Mechanics' Lien Law (Wood's Digest, 538) provides that "the land upon which any building or superstructure shall be erected, together with convenient space around the same, or so much as may be required for the convenient use and occupation of the premises, shall also be subject to the lien," etc. The notice and the complaint in this case follow the terms of the statute, and are sufficient as a matter of description. In cases of this kind it is proper for the court, by its decree, to define the amount and extent of the land connected with the mill which is properly subject to the lien. The decree in this case, however, does not do so; and this is also urged as an objection. Such an omission will not invalidate the decree, but it renders it doubtful whether a purchaser under it will acquire any land beyond that covered by the buildings. That question, how-

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ever, is not properly before us; and it is not necessary to determine it. No objection of this kind seems to have been raised in the court below by demurrer or otherwise; nor does it appear that the appellants requested the court to define in its decree the extent of space around the mill to be subjected to the lien. Under such circumstances, they will be deemed to have waived such objections.

The next point is, that none of the materials furnished by the plaintiffs had been delivered at the mill at the time the mortgage held by the appellants was executed and recorded, and it is contended, therefore, that the plaintiff's lien did not attach to the property until after the mortgage. The statute then in force provided that "the liens created by this act shall be preferred to every other lien or incumbrance which shall have attached upon the said property subsequent to the time at which the work was commenced, or the first of the materials were furnished; and also to all mortgages and other incumbrances unrecorded at the time such work was commenced or the first of such materials were furnished." The court found among other things, "that the plaintiff, on the twenty-fifth day of September, 1860, commenced to furnish, for the construction of the quartz mill described in the plaintiffs' complaint, certain necessary castings," etc. The mortgage held by Brown & Andrews was dated October 22d. The question is, whether or not the word "furnished," as used in the statute, means "delivered at the building" in the construction of which the materials are furnished. We think that such is not its reasonable construction. The material man is properly said to have "furnished" the materials, when he has delivered, or has them ready for delivery, at the place where he has agreed to deliver them under the contract; which in this case was at the plaintiffs' foundry, some distance from the quartz mill; this point, therefore, is not tenable.

The next questions to consider are those relating to the lien of Morgan, one of the parties to the action. It is insisted that the petition filed by him, asserting his claim and lien, does not state facts sufficient to constitute a cause of action, and therefore the court erred in admitting any evidence in support of the claim over the objection of the appellants. The proceedings in actions to enforce mechanics' liens are special,

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and peculiar in their character. Under the seventh section of the act in force at the time this action was commenced, (Wood's Dig. 538, 539,) it was not necessary for the lienholder who commenced the action to make other holders of liens under the statute, parties by name, but they were brought in by a published notice, "notifying all persons holding or claiming liens on said premises to be and appear in said court, on a day to be therein specified, and to exhibit then and there the proof of said liens." "On the day appointed, the court shall proceed to hear and determine the said claims, in a summary way, or may refer the same," etc. It will be seen that the proceedings are summary in their character, and differ entirely from ordinary actions. The exhibit of proof of liens, by lienholders coming in under the notice, is not governed by the sections of the Practice Act relating to interventions; and the papers filed by them, exhibiting their claims, are not governed by the strict rules relating to pleadings in ordinary actions. In this case, the lienholder, Morgan, presented his claim in the form of a petition duly filed in the action, in which his demand and lien were set forth. It is objected that it does not state that the lumber was furnished to be used in the construction of the mill, or that it was used in that manner. This objection, if a valid one under the statute referred to, should have been taken by demurrer, and not by objection to the evidence which showed that it was thus furnished and used.

The notice of lien filed by Morgan sets forth that the lumber was furnished to "Moore & Co.," and it is objected that the lien can not be enforced against property owned by Moore, and not Moore & Co. The material facts to sustain the lien are, that the materials were furnished for, and were actually used in the construction of the building on which the lien is claimed. Whether the owner purchased the materials in his own name, or in the name of a firm of which he was a member, can make no difference, so far as relates to the lien, which is the only matter the appellants have a right to contest.

The notice filed by Morgan includes claims for lumber furnished for the construction of the quartz mill, and also a blacksmith shop, and a building erected over the shaft of the mine. It is contended that by filing his notice in this form, he loses all lien on either. Whether in a case like this, where

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all the buildings, though separated from each other, form one establishment, and are all used, and are necessary in conducting the one business carried on, the lien of the mechanic or material man, can be held to include all the buildings in one claim and lien, it is unnecessary to determine. The court in this case, in its findings, separated the amount due for the materials furnished for the construction of the quartz mill proper, from that for the other buildings, and rendered its decree accordingly. In this no error was committed to the injury of the appellants.

The next class of objections to be noticed are those which relate to the Lambard mortgage. The mortgage held by the appellants is dated October 22, 1860, and was recorded in Amador county the same day. It was executed under the Chattel Mortgage Act (Wood's Dig. 108), and the property mortgaged is described as follows: "All that certain piece or parcel of land or lot of ground, and the improvements thereon, known as Sidores Quartz Lode or Ledge, situate in Amador county and State of California, about one mile south from the town of Jackson, near the head of Hunt's Gulch, commencing about one hundred and fifty feet south of Howard's Garden, running thence southeast one thousand feet; said range running in a southeast and northwest direction, and being of sufficient width to cover said lode, with all the surface widths, dips, angles, and branches, and all things pertaining to the same, and being the same lode now worked by Albert Moore; also the quartz mill, being at this time in the course of erection upon or near the said lode, together with the boiler, engine, stamps, and machinery of all kinds and descriptions, in or about said mill now, and when the same shall have been completed, and all fixtures, furniture, and implements used in or about said mill or quartz lode, and also all quartz rock taken from said quartz lode that may be at or near said mill and lode at the time of foreclosure of this mortgage," etc.

The Lambard mortgage is dated November 16, 1860, and was duly recorded in Sacramento county, where the property then was, November 17th, and in Amador county on the nineteenth of November. It was executed in pursuance of the provisions of the same Chattel Mortgage Act, and the property mortgaged is described as follows: "One steam

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engine of the following description: twelve-inch cylinder, twenty-four-inch stroke; one heater, one force-pump, one wheel and pinion and one steam-gauge. Also, one steam boiler of the following description: twenty feet long, and forty inches in diameter, having five nine-inch flues." Soon after this mortgage was given, the property described therein was removed from Sacramento to the quartz mill, and put up therein, for the purpose of running the machinery thereof. The appellants claim that when this property was put up in the quartz mill it became a fixture and part of the realty; that it became thereby a portion of the property covered by their mortgage; that their mortgage, being prior in time to that of Lambard, it became a lien thereon prior to that claimed by Lambard; therefore the proceeds of the sale thereof should be applied first to the satisfaction of their debt, and that the court below erred in giving priority to the lien of Lambard. It is not pretended that the appellants' mortgage was any lien upon this boiler and engine at any time before the same was attached to the realty. At the time the Lambard mortgage was executed there was no lien or incumbrance upon this property. Their mortgage was duly executed and recorded, in compliance with the statute, and at its date it was the prior and in fact only lien thereon. After the execution of the Lambard mortgage, the mortgagor took possession of the property, removed it, and set it up in the quartz mill. Did this act of the mortgagor, even though done with the knowledge and consent of the mortgagee, divest the latter of a valid lien, fully vested, and subject it to a prior lien on the mill? Treating the property described in the appellant's mortgage as real estate, there is no doubt that, when the boiler and engine were attached to the realty, they became subject to his mortgage: *Ferguson* v. *Miller*, 6 Cal. 402; *Sands* v. *Pfeiffer*, 10 Id. 258; *Union Water Co.* v. *Murphy's Flat Co.*, 22 Id. 620.

But it is equally clear that their mortgage was no lien thereon before the property was so attached. We are not aware of any rule of law or equity which will divest the defendant Lambard of the priority of lien lawfully acquired by him upon the property described in his mortgage, by any such means as are shown in this case. The cases referred to by the appellant

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merely sustain the principles above referred to as already decided by this court, but they have no application to the present case. The cases of *Winslow* v. *The Merchants Ins. Co.*, 4 Metc. 306, and *The Union Water Co.* v. *Murphy's Flat Co.*, 22 Cal. 620, were very similar in principle. In both cases fixtures and improvements had been put on the real estate *after* the first mortgage, but *before* the second had been executed. In both cases the real estate itself was the subject of the mortgages, and it was held in both cases that the fixtures became subject to the first mortgage as soon as they were attached to the realty, and therefore the first mortgage was a prior lien. But those cases differ from the present in this: that here there was a valid, subsisting mortgage upon the engine and boiler *before* the appellant's mortgage became a lien thereon; and although the Lambard mortgage bears a later date than the other, yet it was a lien upon this property *before* that had attached. We think it more consistent with the rules of equity to hold that the lien of appellant's mortgage upon the engine and boiler dates only from the time they became attached to the realty; and that time being subsequent to the date of the Lambard mortgage, it is subject to the lien of the latter. Ordinarily, the lien in such case would be construed to relate back to the date of the mortgage; but this doctrine of relation will not be so applied as to defeat or divest intermediate rights and liens lawfully acquired. In a case like the present it should not be construed to relate back beyond the time the property was affixed to the realty, as against the Lambard mortgage.

Both mortgages are executed and recorded as chattel mortgages, under the statute; and treating them in that character, there can be no doubt that the Lambard mortgage has priority over the other so far as relates to the property included in it. The provision in section 2 of that act, respecting the recording of the mortgage in the county where the mortgagor resides and the property is located, and the proviso respecting the removal of the property to "a location for use," and the time allowed for recording by Sec. 7, clearly contemplate that property of the kind described in the act is to still remain subject to the mortgage lien, though its location be changed, and it be put to use in connection with other property. Much

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of the property covered by the act, such as saw mill and grist mill machinery, steam boilers, steam engines, machinery, and buildings connected with quartz claims, etc., are of such a character that they are of little or no practical use until they are secured by attachment to real estate in the nature of fixtures, and the evident object and intent of the statute, to protect the mortgagee of such property, would be entirely defeated by holding that a mortgage lien thereon, before becoming fixtures, would be defeated and divested, or subordinated to another mortgage upon becoming a fixture. The separation and removal of the boiler and engine from the realty will leave the latter in no worse condition than it was before they were put up; so that affords no just ground for a different rule. There is no ground for saying that there has been a confusion of goods by attaching the property to the realty. There is no difficulty in distinguishing and separating the several articles named in the Lambard mortgage.

The judgment is affirmed.

HUNTER, Respondent, v. THE SAVAGE CONSOLIDATED SILVER MINING COMPANY, Appellant.

(4 Nevada, 153. Supreme Court, 1868.)

A miner's lien law, not retroactive in terms, will not be construed to give a lien for work done before its passage.

[1] **Appropriation of payments.** Where payments are made from time to time on account of labor, for a part only of which labor the miner has a lien, the payments will be credited against that part of the debt which is unsecured.

The day of the date of the passage of an act is to be excluded from the period during which it operates.

Appeal from the District Court of the Sixth Judicial District, Lander County.

The facts are stated in the opinion.

GEORGE S. HUPP and R. M. CLARKE, for appellant.

[1] *Trullinger* v. *Kofoed*, 7 Oreg. 228; compare *Truscott* v. *King*, 6 N. Y. 147.

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HENRY MAYENBAUM and SAMUEL C. DENSON, for respondent.

By the Court, BEATTY, C. J.

This was a bill filed by John Hunter to foreclose a miner's lien on the mining claims and property of defendant. Some other parties besides John Hunter come in under the statutory proceeding provided in such case, and also assert their liens. The facts of the case, as they appear by the findings, are, that John Hunter and two other parties who intervened in this case commenced work for the defendant, a corporation, in the latter part of the year 1866; two more of the intervenors commenced in January, 1867. All these parties continued work down to, say, some time in May, 1867. Three other intervenors commenced work on or after the 15th of February, 1867, and continued down to some time in May of that year. Prior to February 6, 1867, there was no law allowing liens upon mining claims for labor, such as appears to have been done in these cases. On that day, however, a law was approved and went into effect allowing liens in favor of laborers for work done on mining claims. Those who had commenced work before the new lien law went into operation filed a lien, as well for the work done before as after the passage of the law.

The court below gave a decree allowing a lien in favor of the laborers from the first day they commenced work. In our opinion this was error. The law, by its terms, does not purport to give a lien for labor done before its passage. It was evidently the intention to give the lien only to secure the payment of wages for work done after its passage. The decree, then, will have to be so modified as only to allow a lien to take effect for such labor as was performed after February 6, 1867. The facts found do not show how much of the labor was done before, and how much after that date. It will, therefore be necessary to open the case in the court below so far as to ascertain what proportion of work was done before and what after the law was passed.

Several of the parties received payment of part of their wages whilst at work. These payments will be deducted in

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the first place from the labor done at the earliest period, and before the passage of the act securing a lien. No part of the payments will be applied on the debt secured by lien except where payments exceed the debt due for labor performed before the lien law was passed. Then, after ascertaining what portion of the debt of each of the parties is secured by lien, a decree will be entered against the property of appellants described in the several lien claims. For the balance of the debt due to each an ordinary judgment will be entered. We regret having to reverse this case, because no substantial right of appellants has probably been affected. It can make but little difference to the corporation whether its property be sold in pursuance of a decree to foreclose a mechanic's lien, or under an ordinary execution. If the property is sold under a decree, and there is any surplus after paying the liens, the court could properly order it to satisfy the executions. But the defendant would, upon paying the amount of the decree for miners' liens, be entitled to have the real estate reserved and exempted from sale until its personal estate was exhausted. Strictly, then, the decree should not establish any lien dating prior to February 7, 1867.

As the law was approved on the 6th, and the fractions of days can not well be estimated in a case of this kind, the first day's labor for which a lien should attach would be the first day's work done either on or after February 7th. The complaint does not show that the plaintiff performed any labor of such a character as would entitle him to a lien under the law as it stood in 1861, but some of the intervenors may have shown that they performed labor for which they had a lien under the old law. The case will be so far opened as to allow any of the parties thereto to show the extent of their liens and to let in any proof on the part of defendant tending to diminish the extent of these liens. So far as the amount of the demands established by plaintiff and the intervenors are concerned, we see no reason for opening the decree.

Judgment reversed and cause remanded for further proceedings, in accordance with this opinion.

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NOLAN, Respondent, v. LOVELOCK ET AL., Appellants.

(1 Montana, 224. Supreme Court, 1870.)

Tenants in common of a mine, working it together and dividing the profits in proportion to their interests, are mining partners.

[1] **Each mining partner has authority to hire labor** and to bind the firm for its payment.

[2] **Secret agreement limiting power of partnership.** If there be an agreement among a firm of mining partners that no member should hire workmen or contract for necessaries without consent of the others, notice of such agreement must be brought home to the party hired or contracted with.

The power of a majority to contract the claim considered.

The complaint of a party claiming a miner's lien need not show whether the contract sued on was an express or whether an implied contract.

[3] **Claiming in excess of the real amount** does not vitiate the lien for the real amount due.

In a suit against partners an item of debt, due by the defendants and others jointly, can not be recovered.

Appeal from the Third District, Meagher County.

In April, 1870, Nolan commenced this action against Lovelock, J. R. Weston and J. A. Harding, in the District Court of Meagher county. The defendants demurred to the complaint, because there was a defect and misjoinder of parties defendant; the complaint did not state facts sufficient to constitute a cause of action, and the complaint was ambiguous. The demurrer was overruled, and defendants excepted.

The cause was tried in May, 1870, by the court.

It appeared from the evidence that the defendants owned mining ground in Confederate gulch, Meagher county, in the following undivided proportions: Lovelock, $\frac{64}{100}$; Weston, $\frac{26}{100}$; and Harding, $\frac{10}{100}$. Lovelock hired Nolan to run a whim upon the mining ground, and agreed to pay him for his services and the use of his mule $7.50 per day. Weston sometimes paid him for his services, and gave him on January 6, 1870, the following instrument: "Due from Lovelock, Weston & Co., to date, to John Nolan, $444.50." The defendant also owed other sums to Nolan on different accounts. Neither Harding

[1] *Roberts* v. *Eberhardt*, 1 Kay, 148; *Post* PARTNER.

[2] *Burgan* v. *Lyell*, 2 Mich. 102; *Post* PARTNER.

[3] *Allen* v. *Frumet M. Co.*, 73 Mo. 688.

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nor Weston ever spoke to Nolan about his contract. None of the defendants had any authority from the others to hire laborers, or bind them by his contracts, and each defendant was to pay his proportion of the expenses.

The plaintiff filed his account in the county recorder's office, in Meagher county, to secure a lien on the mining ground for his services, and claimed that the defendants owed him $544.90.

The court rendered judgment for plaintiff for $544.90, and that he was entitled to a lien on the mining ground to secure the payment of $445.90 thereof.

The court, SYMES, J., overruled the defendants' motion for a new trial, and defendants appealed.

CHUMASERO & CHADWICK, for appellants.

S. ORR and SHOBER & LOWRY, for respondent.

KNOWLES, J.

This is an action to foreclose a lien upon certain mining ground owned by appellants, for work and labor done thereon. The respondent, in the court below, obtained judgment against the appellants for $544.90, and a decree for the sale of this mining ground—upon which a portion of the work had been performed—to satisfy $445.90 of this amount. The appellants, in the court below, moved for a new trial, which was denied. From this judgment they appealed to this court, assigning as error the points which will now be considered.

The evidence shows that the appellants owned certain mining ground in Confederate gulch as tenants in common; that they worked it together, and that the gold taken therefrom went first to pay the expenses of working it, and the residue, if any, was to be divided among them in proportion to the interest of each in the mining ground. This made them mining copartners: *Duryea* v. *Burt*, 28 Cal. 569.

One of the partners, Lovelock, employed respondent to work on the mining ground in mining. He performed work that amounted to $445.90, for which he was not paid. The question arises whether Lovelock had authority to bind his

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copartners in contracting a debt for working in their mine One partner in a mining copartnership has authority, by implication of law, to bind his copartners in creating a debt for the purpose of working their mine, if it appears that such work was useful or necessary for that object: Yale on Mining Claims and Water Rights, 224, and cases there cited. There is no doubt but that the labor performed by respondent was useful in working their mine, and that appellants received the benefit of it. Perhaps, in some cases, one partner might limit his liability even for necessaries, by giving notice to the person performing such work, in due time, that he would not be liable therefor. Where, however, a firm is composed of more than two persons, if a majority agree upon any undertaking in working mining ground, it would be doubtful whether any one of the partners could limit his liability for necessaries, as a majority of the firm, in such cases, ought to control: *Dougherty* v. *Creary*, 30 Cal. 290.

In this case there were three copartners, one of whom hired respondent, and another of whom settled with him and gave him a memoranda, stating how much the firm was indebted to him. This would go to show that at least one had contracted with respondent, and the other had ratified it. The appellants all testified that neither one of the firm had authority to bind the others, and also considerable concerning the interest of each in the mining ground. It might be that some of this evidence was introduced to show that the copartners had limited their liability, but I do not think it was sufficient to warrant the court in finding any such notice. I am, however, inclined to think that appellants introduced this evidence to show that appellants were tenants in common of the mine, and, hence, were mining copartners, under the impression that it devolved upon the respondent to show some express authority, from each copartner, to authorize any member of the firm to bind the rest. The rule, however, is different. It devolves upon the firm to show that they had an express agreement with each other that one should not contract for what was useful or necessary without the express consent of the others, and that the party contracting with any member of the firm had notice of this agreement. Without this the law gives authority to each member of a mining copartnership

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to bind the rest for what is useful and necessary in their undertaking. No such agreement as this was proved in this case.

There is nothing in the point insisted upon by appellants' counsel, that the complaint does not state facts sufficient to warrant the court in decreeing respondent a lien on the mining ground, because the complaint does not say that the respondent labored upon this mining ground under an express or an implied contract. The facts set forth in the complaint show that the respondent performed the work under an implied contract. This is sufficient. It is not necessary for a party to state the name of the contract he sues under. When he states the facts amounting to a contract the law names it.

It is claimed by appellants that because respondent claimed a lien for a larger amount than he was entitled to, he lost his lien. A person seeking to foreclose such a lien appeals to the equity powers vested in a court. No court of equity ought, in the absence of an express and positive statute, to hold that a person claiming a lien for more than he was entitled lost his lien, unless it clearly appeared that there was some fraud connected therewith.

The respondent is, therefore, entitled to a judgment against the appellants for $445.90, and a lien for that sum on the mining ground upon which he performed the work.

The court below gave the respondent a further judgment for $93, for work done on a bed-rock flume. In the statement on the motion for a new trial, the contract under which this work was done is set out in full. It is not a joint contract. These appellants and other parties became bound, individually, each in a certain sum, and neither one in any way became bound for the other. There is no evidence that this copartnership ever became, in any way, bound for this debt. If any of the individual members of the firm owe this amount or portions of it, the respondent must recover of them individually. He can not recover it in this action.

The judgment of the court is, therefore, modified. Respondent should have judgment for $445.90, and a decree for the sale of the mining ground specified in the notice of the lien.

Judgment modified.

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IN RE HOPE MINING CO.

(1 Sawyer, 710. U. S. District Court, District of Nevada, 1871.)

[1] **Hauling quartz to a quartz mill** is "performing labor for carrying on the mill," and gives the teamster a lien on the mill.

Liberal construction to be applied to the Mechanics' Lien Law.

Repeal of the statute after the lien has attached by the performance of the labor, but before the filing of the statutory notice, does not defeat the lien.

Secured claim in bankruptcy. When a creditor, in ignorance of his rights, has proved a secured claim as unsecured, he will be allowed to amend by setting up his security.

Before HILLYER, District Judge.

Petition of a creditor in bankrupt proceedings, for leave to amend proof of his claim by setting up lien.

M. S. STONE, for petitioner.

W. E. F. DEAL, for respondent.

HILLYER, J.

This is a petition, filed by one J. A. Waddell, for leave to amend the proof of his claim by setting out as security therefor a laborer's lien.

Omitting such portions of the lien law as do not bear upon this case, it reads: "All persons performing labor for carrying on any mill, shall have a lien on such mill for such work or labor done." Statute of Nevada, 1869, p. 61. The mill upon which a lien is claimed is one for crushing quartz and separating the precious metals therefrom, and the labor performed by petitioner was hauling quartz for the bankrupt to be crushed in this mill. This, it is said, is not "performing labor in carrying on the mill," but I think it must be so considered. These laws always receive a liberal construction in favor of the laborer's lien. The labor of hauling quartz to a mill of this character

[1] *Contra, Barnard* v. *McKenzie*, 9 M. R. 403. And see *Wilson* v. *Whitcomb*, 100 Pa. St. 547.

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is indispensable to carrying it on, and the language of the statute will not have to be strained in the least to include within its terms the person performing such labor.

Another point is made upon the repeal of the law. The labor in this case was performed while the laws of 1861 and 1869 were in force, and before the commencement of proceedings in bankruptcy, but the notice and account required by the statute to be filed with the county recorder were not filed till after the proceedings in bankruptcy were begun, and the laws of 1861 and 1869 had been repealed. On the fourth of March, 1871, the legislature passed a law which embodied all the old laws in relation to mechanics' liens, extended their provisions to a few objects not before included and repealed all former laws on the subject, without any clause saving rights acquired under those laws. It is now claimed that the lien of the petitioner was lost, because he failed to file his notice with the recorder before the repeal of the laws under which it accrued.

In the case of *Sabin* v. *Conner*, decided in this court and recently affirmed on appeal to the circuit court, it was held that the lien given by these statutes was acquired by the performance of the labor, and that filing the notice and bringing suit within the time prescribed were merely means to be used to preserve the lien and make it available; that where, as in this case, the legislature had in one act consolidated all the old laws on the subject of mechanics' liens, and repealed the former laws, the new act was to be considered as substituted for and continuing in force the provisions of the old laws, rather than to have abrogated and annulled them; citing *Steamship Co.* v. *Joliffe*, 2 Wall. 450, and *Wright* v. *Oakley*, 5 Met. 400; and that if it were otherwise, it must be held that the effect of the repeal was to blot out the old laws "as completely as if they had never been enacted," and the repealing act itself would be void so far as it impaired the obligation of the defendant's contract by taking away from him all remedy for its enforcement. These principles are decisive in this case. The laws in force at the time the petitioner made his contract and performed the labor under it, were part of the contract. These laws gave him a lien upon the mill as a security for the wages of his labor, and when this lien is taken from him noth-

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ing of any value remains of the obligation of his contract. *McCracken* v. *Hayward*, 2 How. 608; *Bronson* v. *Kinzie*, 1 How. 311; *Smith* v. *Morse*, 2 Cal. 524; *Quackenbush* v. *Danks*, 1 Denio, 128.

But the assignee insists that, admitting the petitioner had a lien, he has waived and surrendered it by proving his claim without reference to his security, and he relies on the cases of *Stewart* v. *Isidor*, 1 B. R. 129, and *In re Blass*, 4 B. R. 37. In both of these cases the decision turned upon the language of the twenty-first section of the Bankrupt Act, which declares in express terms that a creditor, by proving his claim, discharges and surrenders all unsatisfied judgments, and proceedings commenced. This case arises under section twenty of the act, which contains no language like that in section twenty-one. I presume that whenever it appears that a creditor has proved his secured claim as an unsecured one, intending thereby to share in the general assets and avail himself of his lien also, or with any other fraudulent intent, the court will compel such creditor to surrender his lien to the assignee. But in this case any presumption of fraud is entirely overcome by the facts. The petitioner proved his claim in ignorance of the existence of his lien, and as soon as he discovered the mistake has asked leave to amend his proof. Intending no fraud, and being mistaken as to his rights, the petitioner should not be held to have waived or surrendered his lien: *In re Brand*, 3 B. R. 85; *In re Clark*, 5 B. R. 255.

The petition is granted.

BRADBURY V. CRONISE ET AL.

(46 California, 287. Supreme Court, 1873.)

Insufficient denial of averment of labor. The complaint charged that labor was performed on a certain mining claim and the denial was a denial that he worked for the defendant: *Held*, an admission that the work performed and sued for was done upon the claim specified.

[1] **Denial of legal conclusion.** The denial that plaintiff has a lien is a mere traverse of a conclusion of law.

[1] As to when pleader may aver a conclusion of law: *Hanna* v. *Barker*, 6. Colo. 303; *Sullivan* v. *Iron Silver Co.*, 109 U. S. 550.

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Findings inconsistent with pleadings. A finding contrary to the admissions of the pleadings must be disregarded.

Appeal from the District Court, Fourteenth Judicial District County of Placer.

The defendant Schnabel owned the Julian mine, and the defendant Cronise made a contract with him to purchase the same, and was allowed to enter into possession of and work the same. A large number of persons, with the knowledge of Schnabel, worked on the mine for Cronise, and their wages not being paid they filed liens on the same. All the lienholders except the Lukes, Tompking, Henwood and McCurdy, assigned their demands to the plaintiff, who brought this action to enforce the same, and made Schnabel and the other lienholders parties defendant.

The defendant Schnabel answered, but Cronise made default. The court found that a portion of the labor was performed in cutting cordwood to be used at the mine, and in clearing the ground for a mill site, not on the Julian mine, but that the mill belonged to the mine.

The court below enforced the lien for the full amount claimed, and the defendant Schnabel appealed.

The other facts are stated in the opinion.

Jo HAMILTON, for appellant.

NORTON & BULLOCK, for respondents.

BY THE COURT.

This is an action to enforce a lien on a mining claim for wages alleged to be due to laborers on the claim, and is founded on the act of March 30, 1868, "for securing liens of mechanics and others." Stats. 1867–8, p. 589. The complaint alleges that the labor was performed on the mining claim, and this averment is not denied in the answer. It is true there is a denial "that the plaintiff and his several assignors did work and labor for said W. H. V. Cronise, and that the said Cronise is indebted to them for the same the several sums of money averred in the complaint," and there is also a denial that the plaintiff has any lien on the mine, which is only a conclusion of law, and not the denial of a fact.

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The first amounts to nothing more than a denial that the work was done for Cronise, or that he is indebted to the plaintiff in the sum claimed. But by no reasonable intendment can it be held to be a denial that the labor was performed *on the mining claim*, as averred in the complaint. The averment that the labor was performed *on the mining claim* must therefore be deemed to have been admitted by the pleadings, and it was not possible for the defendant to controvert the fact at the trial. If the court found the fact contrary to the admissions of the pleadings the findings must be disregarded. The defendant can not, therefore, on the appeal, raise the question whether a portion of the labor was performed elsewhere than on the mining claim.

The complaint avers that it was well understood between the laborers and Cronise that the wages were to be paid in gold coin, which was denied by the answer. But the court finds that Cronise expressly promised to pay in gold coin, which brings the case clearly within the provisions of section two hundred of the Practice Act, as amended in 1870: Stats. 1869–70, p. 295.

We see no error in the judgment, which is therefore affirmed.

STENGER v. EDWARDS.

(70 Illinois, 631. Supreme Court, 1873.)

[1] **Co-tenant's lien for improvements preferred against mortgage.** Where one tenant in common, with the consent of his co-tenant, has improved the estate before the execution of a mortgage by the latter, one half the outlay will be a prior lien to that of the mortgage, and will be first paid out of the proceeds of sale under the mortgage.

No lien for receipts against each other. When one tenant has collected in excess of his share of the rents of the estate, no lien attaches in favor of the other tenant; his remedy is by action for an account.

Attorney's fee in partition. Where a proceeding for the partition of land is an amicable one, a solicitor's fee may be taxed as part of the costs; otherwise, if there be a contest.

[1] Improvements by one co-tenant on his own account: *Mellor* v. *Vallentine*, 3 Colo. 260.

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Writ of error to the Court of Common Pleas of the City of Aurora; the HON. RICHARD G. MONTONY, Judge, presiding.

Mr. C. S. METZNER, for the plaintiff in error.

Mr. FRANK M. ANNIS, for the defendant in error.

Mr. Chief Justice BREESE delivered the opinion of the Court.

This was a petition for partition in the Court of Common Pleas of the city of Aurora, in the county of Kane, filed by Isaac Edwards, against Otto Groch and the other heirs at law of Robert Groch, deceased, claiming one equal part of certain premises particularly described in the petition, as tenants in common. One Michael Stenger, a mortgagee of Groch's interest, was made a party.

Answers were put in and replications, and on the hearing the court adjudged a partition of the premises in equal parts the one half allotted to the heirs of Groch, to be subject to Stenger's mortgage, the amount of which was found to be eight thousand three hundred and nineteen dollars and forty-four cents.

It appears the premises had upon them a stone quarry and lime kiln, and three small dwelling houses; and the court found that Groch, in his lifetime, had the entire use and benefit thereof, and that petitioners' share thereof amounted to two hundred and forty-three dollars and fourteen cents, and that Edwards had expended, in the improvement of the property, a sum of money the one half which would amount to forty-nine dollars and forty-four cents, all which, by the decree of the court, were made a lien on Groch's interest, prior to that of Stenger's mortgage. An attorney's fee of one hundred dollars was also allowed, and charged upon the same interest.

Commissioners were appointed to divide the land equally between the petitioner and the heirs of Groch, and, having performed that duty by dividing the same, reported to the court and their report was confirmed.

To reverse these proceedings, Stenger, the mortgagee, brings the record here by writ of error, and complains that his mortgage is postponed to the rents collected by Groch, in

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his lifetime, to the cost of the improvements made by petitioner on the premises, to one half the avails of the use of the lime kiln, and in charging the solicitor's fee against the Groch interest, and making each and all these items a prior lien upon the premises.

We are of opinion so far as the improvements on the land are involved, and as having been made by the petitioner with the consent of Groch, in his lifetime, and before the execution of the mortgage to the plaintiff in error, one half the outlay for the same should be held and regarded as a prior lien, and should be first paid out of the proceeds of the sale under the mortgage: *Gardner* v. *Diederichs*, 41 Ill. 158. But the record is silent as to the time, whether before or after the execution of the mortgage. As to the rents received by Groch, to one half of which defendant in error claims to have been entitled, we are referred to no authority under which they could be considered a lien. The remedy in such case would be by action of account.

Adjudging solicitor's fee against the defendants in the petition was error, as the suit does not appear to have been an amicable proceeding, but was contested. Answers were put in and replications, and the cause went regularly to a hearing and final decree. By the construction heretofore given to the act of 1869, it is only in case of an amicable suit for partition the solicitor's fee can be taxed as costs *pro rata* against all the parties: *Kilgour* v. *Crawford*, 51 Ill. 249.

For the reasons given the judgment is reversed and the cause remanded. *Judgment reversed.*

SKYRME, Respondent, v. THE OCCIDENTAL MILL AND MINING CO. ET AL., Appellants.

(8 Nevada, 219. Supreme Court, 1873.)

Omission of allegation of time of filing lien notice. Where a complaint fails to show that suit to foreclose lien was brought within the statutory period, the defect should be taken advantage of by demurrer. After issue joined and a decision on the merits, it will be supported by every legal intendment.

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[1] **Assignability—Action by assignee.** Mechanics' liens are assignable; the lien may be enforced by action in the name of the assignee; the assignee of several claims may foreclose all in one action, and an assignment of the lien carries the debt. No particular form of words is necessary to constitute an assignment.

An assignment after suit brought, in aid of a less formal assignment made before suit, is inadmissible; but the original assignment being held sufficient, its admission becomes immaterial.

[2] **Effect of repeal of statute.** Where the Mechanics' Lien Act was repealed and at the same time substantially re-enacted: *Held*, that liens accrued under the old act were not divested by the repeal.

Improper joinder, cured. Where sundry lien claimants filed a joint lien, and afterward filed their several liens as they should have done in the first instance: *Held*, that they could treat the first filing as a nullity.

[3] **Day labor and contract work mingled.** Work was done by many miners under the direction of the foreman, by the day, alternating with small contracts with sundry parties among the miners for running a few feet at so much a foot. *Held*, that it was one continuous transaction to be protected by a single claim for lien on behalf of each miner.

Effect of receiving note and filing on the note instead of for the labor. A lien notice stating that it is filed to secure a note—the note having been given for labor on the mine: *Held*, that though informal, it should be sustained as a valid claim of a lien for the labor, and that the taking of a note in settlement is no waiver.

[4] **Construction.** The Mechanics' Lien Law is to be liberally construed.

Appeal from the District Court of the First Judicial District, Storey County.

This was an action to foreclose mechanics' liens, to the amount of $10,167 in coin, against the Occidental Mill and Mining Company, a corporation doing business at Virginia City. William Sharon, E. H. Dyer and Mark Strouse were made defendants, as having or claiming interests which were alleged to be subsequent to those of plaintiff.

The complaint set out the rights of plaintiff, as the holder of a mechanic's lien for work performed by himself, and as assignee of various liens of the same general character for work performed by his assignors, at the company's mine in Storey county, between May 1, 1870, and October 23, 1870. There was no demurrer but a very full answer. The testimony was taken before a referee, and upon the coming in of his report

[1] *Ford M. Co.* v. *Langford*, 1 Colo. 62.

[2] *Capron* v. *Strout*, 9 M. R. 391; *contra*, *Purmort* v. *Tucker Co.*, 2 Colo. 470; *Woodbury* v. *Grimes*, 1 Colo. 100; see *Elliston* v. *Jackson Co.*, 4 M. R. 559.

[3] *In re Hope Co.*, 9 M. R. 364; *Barnard* v. *McKenzie*, 9 M. R. 403.

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the various points were argued before the court. The result of the trial was a decree in favor of plaintiff for $8,243.78 and costs in coin, and for a sale of the company's mine and claim to satisfy it.

Defendants moved for a new trial which was denied, and they then appealed from the order.

"Exhibits from 40 to 46 inclusive," referred to in the opinion, consisted of formal assignments, made out after the commencement of the suit, in reference to seven of the liens sued on. Other facts are fully stated in the opinion.

R. S. MESICK, for appellants.

W. E. F. DEAL and J. A. STEPHENS, for respondent.

By the Court, HAWLEY, J.

This is an action to foreclose thirty-nine mechanics' liens, thirty-eight of which were assigned to plaintiff to enable him to commence this suit. The liens were claimed by plaintiff and his assignors, as miners, under the act of 1867. (Stats. 1867, 48, Sec. 1.) The appeal is from an order of the court refusing appellants a new trial.

The complaint regularly sets forth the fact, in separate counts, that each assignor performed certain work and labor on the mine owned by the Occidental Mill and Mining Company, a corporation, defendant in this suit, between the first day of May, 1870, and the twenty-third day of October, 1870; that within sixty days after the completion of the work each assignor filed in the office of the county clerk of Storey county his account and demand properly verified, together with a correct description of the property to be charged with his lien; also his notice of intention to claim a lien upon the property therein described as required by Sec. 2 of the act of 1861 (Stats. 1861, 35), and closed with an averment that each assignor, "by reason of the work and labor so done as aforesaid and by complying with the provisions of the said acts of the legislature of the State of Nevada, acquired a valid lien upon the said * * * mining claim * * * which lien remains wholly unsatisfied."

There is no averment in the complaint as to the time when the liens were filed, nor does it appear therefrom that the

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liens which were assigned to plaintiff were filed within six months prior to the filing of the complaint. For this omission appellants claim that the complaint is entirely destitute of any facts showing the existence of a lien at the time of the commencement of this action. Appellants did not interpose any demurrer to plaintiff's complaint; but appeared and filed an answer, denying (with other denials) that either of the assignors "ever filed or there was recorded in the office of the county clerk of Storey county any just or true account of the demand due him from the said company defendant, for the work and labor mentioned in said complaint, or ever complied with the provisions of the acts of the legislature or any of them mentioned in said complaint, or ever acquired any lien upon the property or premises or any part thereof mentioned in said complaint, or ever sold, assigned, transferred or set over to the plaintiff any lien upon the said property * * * or that the plaintiff ever was the owner or holder of any lien thereon" derived from the assignors or either of them.

If we were to apply the strict rules of pleading to this complaint as in other civil actions, it might be defective in not stating the date when the liens were filed so as to show upon its face that the suit was commenced within six months thereafter. But we are of opinion that this omission is one which should have been taken advantage of by demurrer. After issue has been joined and a decision rendered upon the merits, it is the duty of appellate courts to support the pleading by every legal intendment if there be nothing material in the record to prevent it: Stats. 1869, 206, Sec. 71; *McManus* v. *Ophir M. Co.*, 4 Nev. 18; *Meadow Valley M. Co.* v. *Dodds*, 6 Nev. 264; 1 Van Santvoord's Plead. 834.

We are also of the opinion that the sufficiency of this complaint is to be determined by the statute. The statute creating the right whereby liens are acquired also provides the manner in which they may be enforced. Section 7 of the act of 1861 provides that "said liens may be enforced by suit in any court of competent jurisdiction on setting forth in the complaint the particulars of such demand, with a description of the premises sought to be charged with said lien." Stats. 1861, 37. The same language is contained in Sec. 9 of the act of March 4, 1871: Stats. 1871, 126. While the statute

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provides for a formal suit, it evidently contemplates a special proceeding in regard to the enforcement of mechanics' liens. It requires the plaintiff at the time of commencing his action to cause a notice to be published notifying lienholders to appear in court on a certain day and exhibit proof of their liens, at which time the court is required to proceed in a summary way to determine said liens, and all liens not then presented are deemed to be waived in favor of those that are exhibited. No default can be taken so as to avoid the necessity of proving the liens. Considering the averments in the complaint with special reference to the act of the legislature, we are of opinion that there is a substantial compliance with the requirements of the statute.

Appellants claim that the liens are not assignable. The decisions upon this question differ with the construction of statutes and the different views entertained by judges in the several States. The position contended for by appellants is fully sustained in *Caldwell* v. *Lawrence*, 10 Wis. 331, and *Pearson* v. *Tinker*, 36 Me. 387. The conclusion arrived at in both of these cases was that a mechanic's lien, being the creature of the statute, simply conferred a personal right which could not be transferred, and hence that such liens could only "be enforced in the name of the party to whom it accrued."

In *Tuttle* v. *Howe*, 14 Minn. 150, it was held that the lien of a mechanic or material man might be assigned, and that the assignee, in his own name, might maintain an action to enforce the same. Berry, J., in delivering the opinion of the court, said: "The lien law is designed for the protection of the material man, the mechanic and other persons performing labor upon buildings. As an assignment is not prohibited, and there is nothing in the nature of a lien which would render its transfer improper or injurious, and as the lien is wholly a creature of statute, the statute should be so construed (if it fairly may be) as to make the protection which it designs to afford as valuable and effectual as possible. And upon these grounds we think the assignability of mechanics' liens ought to be sustained if fair construction will permit it."

We do not think the authorities cited in support of *Cald-*

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well v. *Lawrence*, sustain the decision in that case. It is true that in *Daubigny* v. *Duval*, 5 Term R. 604, the court said: "A lien is a personal right and can not be transferred to another." But the court was considering an entirely dif ferent character of liens than those provided for in our statute to secure mechanics and other laborers. The only principle decided in *Daubigny* v. *Duval* is, that a factor has no right to pledge the goods of his principal. But this rule is subject to exceptions as shown by *Urquhart* v. *McIver*, 4 Johns. 103; *McCombie* v. *Davies*, 7 East, 5, cited in *Caldwell* v. *Lawrence*.

In *McCombie* v. *Davies*, Lord Ellenborough, C. J., said "that nothing could be clearer than that liens were personal, and could not be transferred to third persons by any *tortious* pledge of the principal's goods. * * * His lordship then, after consulting with the other judges, declared that the rest of the court coincided with him in opinion that no lien was transferred by the pledge of the broker in this case, and added that he would have it fully understood that his observations were applied to a *tortious* transfer of the goods of the principal by the broker undertaking to *pledge* them *as his own*, and not to the case of one who, intending to give a security to another to the extent of his lien, delivers over the actual possession of goods on which he has the lien to that other, with notice of his lien, and appoints that other as his servant to keep possession of the goods for him; in which case he might preserve the lien."

The statute of Maine in regard to enforcing mechanics' liens is radically different from the statute of this State. In the Wisconsin statute there is a provision that the lien claimant may proceed to recover his lien by a "personal action against the debtor." The statute of Minnesota also differs from the statute of this State in several particulars. The law in regard to mechanics' liens is a constant subject of legislative action, and the decisions of courts in the various States in regard thereto should have but little weight except when applied to the special statute to which they refer. The statute, under which the liens in the present action were filed, is entirely silent upon the question of the assignability of said liens, and in our opinion no substantial reason exists why, under the law

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and upon the facts shown by the evidence in this case, such liens should not be assignable so as to give a right of action in the assignee.

The liens were assigned to plaintiff to enable him to bring the suit in his own name for the benefit of each lienholder. Each assignor was to bear his proportion of the expenses incurred in the prosecution of the suit, and each to share *pro rata* in the amount eventually realized. The plaintiff, as the agent of the several lienholders, might have proved up their liens without the assignment. But an assignment having been made, we think the assignee has the same right to enforce these liens. By executing the assignment it is evident that it was the intention of each lien claimant to preserve and enforce his lien. The plaintiff need not have brought the suit to foreclose any but his own lien, and then by pursuing the provisions of the statute would have had the right to exhibit proofs as to the others: Stats. 1861, 37, Sec. 7; *Mars* v. *McKay*, 14 Cal. 128. But by bringing suit upon all the liens (doing more than was necessary) he did not, in our judgment, lose the right to have the assigned liens enforced: *Elliott* v. *Ivers*, 6 Nev. 290.

In California it is held that the statute creates a sort of mortgage or security, which follows the original debt or obligation: *Brock* v. *Bruce*, 5 Cal. 280; *Ritter* v. *Stevenson*, 7 Cal. 389. In the case of a mortgage it is held that the debt is the principal thing, the mortgage being but an incident; that independent of the debt the mortgage has no assignable quality. Upon this theory appellants contend that if the liens were assignable they could not be transferred without an assignment of the debt which the liens secured, and claim that no such assignment has been made. The assignment is indorsed on each lien as follows: "For and in consideration of the sum of one dollar in hand paid by William Skyrme, the receipt whereof is hereby acknowledged, I do sell, assign, transfer and set over to said William Skyrme the within lien and all my rights thereunder." Without conceding the doctrine that a mechanic's lien is to be treated in every respect like a mortgage, we consider that the language used in the assignment is broad enough to include the debt. The true principle of sound ethics is to give this language the sense in which the person

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making the assignment, as well as the person accepting it, intended it to have. When the assignors transferred their liens and all their rights thereunder, they meant the right to foreclose the lien and enforce the debt "in any court of competent jurisdiction." The law provides that the mechanic, miner and material man shall have a lien for his work and labor done or materials furnished by complying with the statute. In this respect a mechanic's lien is different from a mortgage executed by the consent of the parties, and also different from a vendor's lien, which arises from principles of equity independent of the statute. In the case of a mechanic's lien the evidence of the debt, that is the account of the lien claimant verified by his oath, is a part of the instrument. The paper we call a lien is simply evidence that the acts required by statute have been performed, and therefore that the lien created by the statute has attached. Is not the assignment of this paper by whatever name it may be called, *with all rights thereunder*, as much an assignment of the debt as it is of the lien?

No particular words are necessary to constitute an assignment of a debt. If the intent of the parties to effect an assignment be clearly established, that is sufficient. If the word *account* had been used instead of *lien* the objection of counsel would probably not have been made. To hold that these liens were not properly assigned would be to allow the merest technicality to triumph over justice. The assignment of the debt or account, and the lien, would undoubtedly be held good as between the parties to the assignment, and we do not think the defendants are in a position to complain because the parties did not use apt words to express their meaning. In arriving at the intention of the parties we have been governed solely by the words of the assignment and the acts of the parties at the time the transfer was made, and have disregarded the several exhibits, from 40 to 46 inclusive. The plaintiff must stand or fall upon the merits of the assignments as they existed when suit was brought. The offer of these exhibits in court was an evidence of weakness on the part of plaintiff, which it was unnecessary to exhibit; and their admission in evidence was an immaterial error which in no wise affects the decree.

It is contended by appellants' counsel that the law under

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which the liens were claimed having been repealed before the commencement of this suit, the right to enforce the liens was lost. In other words, that the liens, being nothing but a remedy created by the legislature, were liable at any time to be abolished, and hence that the liens fell with the repeal of the laws. Without considering the question whether such liens could be destroyed by legislative action, we are clearly of the opinion that the act of March 4, 1871, was not intended by the legislature to have any such effect. The act re-enacts many of the provisions of the law of 1861 and of the several acts amendatory thereto. Its general provisions with reference to filing and enforcing the liens is substantially the same. The law was evidently passed for the express purpose of embracing within its provisions all laws theretofore existing upon the subject of mechanics' liens. The act of 1871 took effect simultaneously with the repeal of all former acts, and was doubtless intended to be substituted in the place of all laws existing upon the same subject prior to the time of its passage, so that instead of abrogating and annulling prior laws it had the effect to continue them in force in so far as existing rights thereunder were concerned.

Judge Hillyer, in the District Court of the United States for the State of Nevada, has given to this law of 1871 the same construction. In *Sabin* v. *Conner*, in bankruptcy, the learned judge says: "It is plain that the legislature never intended to destroy rights acquired under the old laws, but simply to consolidate all the laws upon the subject of mechanics' liens and to extend it to some objects not before included." The same principle has been decided in *Steamer Gazelle* v. *Wells Lake*, 1 Oregon, 119; *Wright* v. *Oakley*, 5 Met. 406; *Steamship Co.* v. *Joliffe*, 2 Wallace, 458. The remarks of C. J. Shaw upon the repeal of the statutes in Massachusetts are applicable to the present case. He said: "In construing the Revised Statutes and the connected acts of amendment and repeal, it is necessary to observe great caution to avoid giving an effect to these acts which was never contemplated by the legislature. In terms, the whole body of the statute law was repealed; but these repeals went into operation simultaneously with the Revised Statutes, which were substituted for them and were intended to replace them, with such modifications as

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were intended to be made by that revision. There was no moment in which the repealing act stood in force without being replaced by the corresponding provisions of the Revised Statutes. In practical operation and effect, therefore, they are rather to be considered as a continuance and modification of old laws than as an abrogation of those old and the re-enactment of new ones. In order to construe them correctly we must must take the whole of the Revised Statutes, together with the act of amendment and the repealing act, and consider them in reference to the known purposes which the legislature had in view in making the revision."

The next objection of appellants is made upon the following state of facts, viz.: On the 26th day of October, 1870, twenty-nine of the lien claimants (and ten of them on the 29th of October) filed a joint lien for their work and labor done and performed upon the mine owned by the Occidental M. and M. Co. Afterward, on the twenty-sixth and thirtieth of November, 1870, the individual liens, to foreclose which this suit was brought, were filed by each of said lien claimants. Upon this state of facts appellants claim that the lien claimants could file but one valid lien, and that the joint lien having been filed more than six months prior to the commencement of this action and no credit having been given, the lien was lost. The testimony shows that in many instances each claimant made a contract for himself, some commencing at one date and some at another, some working for $3.50 per day, others at $4. In some instances contracts were made with several of the claimants, but in all these cases the settlements were made separately with each contractor, and occasionally some of the contractors received more than the others. There is no provision in our statute for filing joint liens where no community of interest exists, and we are therefore of opinion that the several lien claimants had the right to file their individual liens, treating the joint liens as if none such existed: *Young* v. *Chambers*, 15 Pa. St. 267.

Appellants next contend that the individual liens are taken to secure distinct jobs of work and include separate periods of employment, and therefore that several of the liens are invalid because not filed within sixty days after the completion of each job or contract. A brief review of the testimony will

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show the character of the work. S. Schlewick, the foreman of the mine, after testifying to the amount and character of work performed by each lien claimant, says: "All the work which I have mentioned as having been done by the various parties as miners was done upon the ledge described in the complaint. * * * The contract work * * * was none of it done by the day. The only way that I get at the amount coming to the different men on contract is dividing the amount by the number of men in the contract. The winze contract I made with all the parties to the contract. I can not distinguish between the contracts which I have mentioned, in which I bargained with all the parties to the contract, and those in which I bargained with only a portion *for all.*" C. Mayer, the bookkeeper, testified as follows: "The foreman, Simon Schlewick, furnished me the amount of contract, how much per foot, the number of feet finished, and I worked it out and divided it amongst the men in the contract, whose names he gave me. I was informed by Simon Schlewick that these amounts were due for work done on the Occidental mine." On cross-examination by defendants this witness said: "I don't know whether the $187.50 due Ed. Bowden was due on one or more contracts. * * * I can not say from the books or otherwise that the amount due Bowden was for one or two jobs. The books do not show, neither do I know, when the work was finished on any of the contracts I have mentioned." On redirect examination by plaintiff this witness said: "Each man's account for day labor and contract was kept in one account, but the entries in the journal show what was for day's labor and what was for contract work."

The details of the testimony show that a half dozen contracts were taken by a dozen or more of the lien claimants, some taking two or more contracts, others but one. These contracts were completed, respectively, May 8th, June 11th, July 22d, August 15th, and during the month of October, A. D. 1870. Two were unfinished in October, when the owner of the mine suspended and discharged all the men. The miners at work by contract, when their contracts were completed, either took a new contract, or commenced work by the day in the same mine. The liens include the amount due to each claimant for his entire labor under the contracts and by the day.

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The manner in which the work was conducted in the Occidental mine is quite common in many of the mines in this State. In the prosecution of the work, it is necessary to run tunnels and cross cuts, and sink winzes; and while, as a general rule, the laborers are employed by the day, it is often the case that some of them will take a contract to do this kind of work at a stipulated price per foot, and within a few days after their contracts are completed, either go to work by the day or take other contracts in the same mine. It would be a harsh and unreasonable rule of construction in these cases to hold that the statute required separate liens to be filed for each contract to enable the laborer to secure his wages. The injustice of such a rule would be greater to the mine owner than the laborer. It would destroy the credit necessary at times to have in order to continue operations on the mine, or add unnecessary costs and litigation by filing and foreclosing a multiplicity of liens.

In the case at bar there was not in reality any new employment. The character of work was the same, viz.: labor and work done on the mine. The amount to be paid varied with the peculiar character of the work at different times. We have carefully considered all the testimony and are satisfied that there was not in the eye of the law any such stoppage or change of work as created, independent jobs or contracts requiring the filing of separate liens. The miners worked under the direction of the foreman of the Occidental M. and M. Co., as well under the contracts, as when working by the day. We think it was proper to include the work done under the contracts with the work done by the day, and to treat the employment as one continuous transaction for the purpose of ascertaining the time within which the liens should be filed. *Singerly* v. *Doerr*, 62 Pa. St. 12; *Fitch* v. *Baker*, 23 Conn. 567.

It is next insisted by appellants that the lien of Wm. Tonkin does not upon its face entitle the party claiming it to any lien. It is recited in said instrument that "said lien is to secure the performance of a contract for the payment of seven hundred and thirty-nine $\frac{88}{100}$ dollars in U. S. gold coin, as specified by note (a copy of which is set out in the lien). The above note was given as a settlement according to a verbal agreement for labor done as a miner in extracting ore from

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and working in said Occidental mine, from the last day of February, A. D. 1869, to the fifth day of October, 1870." While we think the better practice would be to state more clearly the character of the work, by whom and for whom done, yet, viewed in the light of the statute requirements, we do not consider that the statement is so defective as to prevent the enforcement of the lien. See Stats. 1867, 48, Sec. 1; Stats. 1861, 35 and 36, Secs. 2 and 5; *Brennan* v. *Swasey*, 16 Cal. 142; *Selden* v. *Meeks*, 17 Cal. 129.

As a further objection to this lien it is claimed, first, that the note was received by Tonkin in full payment of the debt; second, that if received "only as a conditional extinguishment of the debt for work, it became upon its sale and transfer to plaintiff *an absolute extinguishment of the debt and waiver of the lien.*" We have carefully examined the authorities cited in support of this position. In *Scott* v. *Ward*, 4 Iowa, 112, it was held that "if the note had been negotiated or had passed from plaintiff's control to the ownership of another the lien given by statute would be lost. Such transfer would be regarded at law as a waiver of the lien." In the same case the court say: "It has repeatedly been decided by this court that the acceptance of a note is not a relinquishment of a mechanic's lien." The notes referred to had not been actually negotiated, and the opinion of the court simply decided that the court below erred in refusing to admit the lien in evidence, the indorsement of the notes being in blank and having been erased. In *Morrison* v. *Steamboat Laura*, 40 Mo. 261, the plaintiff had accepted notes and then discounted them, and afterward took them up and brought suit to enforce the lien. The plaintiff had the notes at the trial and offered to cancel them. Walker, J., said: "According to the well settled principles of law the lien was neither waived nor destroyed." The plaintiffs "had lost none of their rights and were fully entitled to their lien." In *Raymond* v. *Strobel*, 24 Ills. 113, where it was insisted "that by taking the note of the owner of the premises the petitioner lost his lien," the court say: "While the taking of other security, either on property or that of individuals not parties to the transaction, would have the effect to discharge the premises from the lien, yet the mere settlement and adjustment of accounts and taking the

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note of the owner of the premises who incurred the debt is in no sense a change of security, or security of any description. The note when taken is only evidence of the debt, and can not be held to affect the lien."

The note under consideration was taken by Tonkin from the owner of the mine upon which the work was done. It was taken upon a settlement and adjustment of the accounts as evidence of the amount due. Tonkin's lien was assigned the same as the others, to enable plaintiff to bring this suit in his name. The note was indorsed in blank by Tonkin and delivered to the attorney who commenced this action. The note remained in the possession of said attorney until the day of trial, when it was offered and admitted in evidence to support the lien, and was filed as an exhibit in this case. Under the law, as applied to the state of facts shown by this testimony, no rights of Tonkin or plaintiff were relinquished or lost by the acceptance or transfer of this note.

We have examined all the objections made to each individual lien and consider them without merit. The statute in regard to mechanics' liens was intended by the legislature as a protection to material men, contractors and laborers, and lien claimants are required substantially to comply with its provisions in order to obtain the security which it affords. As was said in *Putnam* v. *Ross*, 46 Mo. 338: "The whole course of legislation on the subject shows that it has been the intention of the legislature to avoid unfriendly strictness and mere technicality. The spirit and purpose of the law is to do substantial justice to all parties who may be affected by its provisions."

Having this object in view we have endeavored to carry out the intention of the legislature, and to give the lien claimants the benefits they are entitled to under the law, by a fair and liberal construction of the statute.

The order appealed from and the decree of the district court are affirmed.

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[1]DAVIS v. ALVORD.

(94 U. S. 545. Supreme Court, 1876.)

[2] **Foreclosed in equity—Personal judgment.** A proceeding to enforce a miner's or mechanic's lien is substantially a suit in equity, notwithstanding the practice of entering a personal judgment usual in such cases.

[3] **Initiation of lien must appear affirmatively.** A lien attaches from the commencement of the work; the date of the commencement of the work, its character to show that it is a lien, and the completion of the work must appear upon the pleadings. The lien notice and affidavit are not legal proof of the date of the commencement of the lien.

Occasional repairs. A lien after the work has been substantially performed can not be kept alive by occasional repairs.

[4] **Work on mill and mine.** Work done on a quartz mill and work done in a quartz mine (separate some distance therefrom) is work done upon two different parcels of property, and the lien upon each can not, by agreement, be apportioned arbitrarily between them, although done under one original contract.

Appeal from the Supreme Court of the Territory of Montana.

Mr. R. T. MERRICK and Mr. M. F. MORRIS, for the appellant.

Mr. J. HUBLEY ASHTON and Mr. NATHANIEL WILSON, *contra.*

Mr. Justice FIELD delivered the opinion of the court.

This is a suit to recover a judgment against the defendant, Charles Hendrie for labor performed by Alvord upon a quartz mine and a quartz mill in Montana Territory of which that defendant is alleged to be part owner, and to enforce a mechanic's and laborer's lien upon his interest in the premises for its payment. It is essentially a suit in equity, requiring specific directions for the sale of the property, such as are usually given upon the foreclosure of mortgages and sale of mortgaged premises. The fact that, according to the modes of procedure

[1] Reversing *Alvord* v. *Hendrie*, 2 Mont. 115.

[2] See *Hornbuckle* v. *Toombs*, 18 Wall. 648, and *Davis* v. *Bilsland*, Id. 661, as to the confusion of law and equity in Montana.

[3] See *Malter* v. *Falcon M. Co.*, 1 West C. R. 514.

[4] *Union Slate Co.* v. *Tilton*, 73 Me. 207.

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adopted in the Territory, a personal judgment for the amount found due is usually rendered in such cases, with directions that if the same be not satisfied out of other property of the debtor, the property upon which the lien is adjudged to exist shall be sold and the proceeds be applied to its payment, does change the character of the suit from one of equitable cognizance and convert it into an action at law. It is not an uncommon practice in many of the States for the courts to direct in suits for the foreclosure of mortgages, a formal rendition of judgment for the amount due upon the obligations secured, instead of directing a reference to a master to ascertain and report the amount: *Rollins* v. *Forbes*, 10 Cal. 299. The complaint is not open to objection for misjoinder of causes of action, because the personal judgment and the enforcement of the lien are both prayed for at the same time. The rendition of the judgment is only a mode of judicially declaring the amount due, and in no respect affects the equitable jurisdiction of the court. The case is therefore properly brought here by appeal.

It appears from the record that on the 1st of August, 1869, the plaintiff entered into a contract with the defendant Hendrie, to work for him in erecting and repairing a quartz mill and in opening and developing a quartz mine in Montana Territory, for the sum of $2,500 a year. The mill was distant about a quarter of a mile from the mine, and it was part of the contract that one half of the time of the plaintiff should be devoted to each.

The erection of the mill was commenced in August, 1869, and occupied about forty days. It was substantially completed in the fall of that year. Some iron guides only were put in during the summer of 1870. After that nothing was done on the mill except to make occasional repairs as they were needed.

It does not appear when the work was commenced on the mine. The plaintiff states that in 1870 he put up steam hoisting works, laid tracks and made cars, and did everything necessary to keep the mine in repair; but as to the commencement of the work in that year, he is silent. The notices claiming a lien, and the affidavits attached, are not evidence on this point against the defendants.

The statute was designed to give security to those who, by

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their labor, skill and materials, add value to property, by a pledge of the interest of their employer for their payment; and for that purpose it subordinates all other interests acquired subsequent to the commencement of their work, although no notice that a lien may even be claimed, is required, except within sixty days after the work is completed. Mortgagees and others acquiring interests in property against which such a lien is sought to be enforced, have a right, therefore, to call for strict proof of all that is essential to the creation of the lien; and that includes proof of the commencement of the work, of its character and of its completion. The commencement of the work must be shown, for from that date the lien attaches, if at all; the character of the work must be shown, for it is not for all kinds of work that a lien is allowed; the completion of the work must be shown, for notice claiming a lien must be filed in the recorder's office within sixty days from that time. This proof must be furnished by the party who asserts the existence of the lien.

From this statement the question as to the priority of the lien claimed by Alvord over the mortgagees of the defendant Davis may be readily answered. The work being done on different parcels of property, the lien claimed on one is to be considered separately from that claimed on the other.

The parties, the plaintiff and Hendrie, had an accounting on the 25th of June, 1871, when over $3,700 were found due to the plaintiff. It was then agreed between them that this amount should be a lien upon the mill and mine in equal proportions. Notices claiming a lien upon each for the amount thus apportioned were accordingly filed in the recorder's office on the following day. A lien did not, however, arise from this contract of apportionment, or from the special contract under which the work was done; it arose from the work which was performed upon the property. It is the work of mechanics and laborers, or the material furnished by them or others, by which value is added, or supposed to be added, to property, which creates the lien under the statute, upon notice claiming it being seasonably filed in the proper recorder's office.

So far as the mill was concerned, the notice was filed too late. That building, as already stated, was completed in 1869, or at least in the summer of 1870, when the iron guides were put in. Occasional repairs, if subsequently made (of which, how-

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ever, the record furnishes no evidence), could not be added to the work performed in the erection of the building months before, so as to render the whole work one continued performance, for which a single lien could be claimed within sixty days after the last repairs.

So far as the mine is concerned there is no evidence of the time in 1870 when the work upon it commenced. The hoisting works were put up, the track was laid, and the cars were made some time during that year; but beyond this we are not informed. All this might have been done after the last mortgage held by the defendant Davis was executed and recorded, in September of that year. We can not presume, in the absence of proof to that effect, that the work was commenced before that time, and thus give to the lien for the work priority over the mortgage. The failure of the plaintiff to show the commencement of the work, when the proof of that fact was within his power, leads to the conclusion that the truth would not have subserved his interests. At any rate as the case stands there is nothing in the record which warrants a subordination of the interests of the mortgagee to the claim of the plaintiff. The finding of the district court that one half of the amount due to the plaintiff was a valid lien on the mine from August 1, 1869, and the other half a lien on the mill from that date, does not help the case, for that finding is only a conclusion of law. No facts are stated upon which the conclusion can be sustained.

Whilst the statute giving liens to mechanics and laborers for their work and labor is to be liberally construed, so as to afford the security intended, it can not be too strongly impressed upon them that they must not only bring themselves by their notices, as was done in this case, clearly within the provisions of the statute, but they must be prepared, if the priority of their lien be disputed, to show a compliance with those provisions and to fix with certainty the commencement and completion of their work; in which particulars the proof here is wanting.

The decree of the district court of the Territory must therefore be modified so as to give the mortgages held by the defendant Davis a priority over the lien of Alvord in the distribution of the proceeds arising upon the sale of the interest of

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the defendant Hendrie, and the cause will be remanded to the Supreme Court of the Territory, with directions to modify the decree in that respect; and it is

So ordered.

SMALLHOUSE v. THE KENTUCKY AND MONTANA GOLD AND SILVER MINING COMPANY.

(2 Montana, 443. Supreme Court, 1876.)

[1] **Superintendent has no lien.** The superintendent of a mining company, having general charge of its mines and works and employed at a monthly salary, can not claim the benefit of the Mechanics' Lien Law: such a claim is analogous to that of a builder charging for superintending his own workmen.

Appeal from First District, Madison County.

The opinion states the facts.

J. E. CALLAWAY and J. G. SPRATT, for appellant.

S. WORD, for respondent.

WADE, C. J.

This is an action to foreclose a mechanic's lien. The defendant, "The Kentucky and Montana Gold and Silver Mining Company," is a corporation created under and by virtue of the laws of the State of Kentucky, doing business in the Territory, and having an office and place of business in the county of Madison. This defendant is in default, having made no appearance in the case. The defendant Elling appeared and filed a demurrer to the complaint, which was sustained, and thereupon judgment was rendered in his favor.

The plaintiff claims a lien upon a certain quartz mill, together with the engine, boiler, belting and other machinery belonging to and used in working the mill; also upon four dwelling-

[1] *Contra, Capron* v. *Strout*, 9 M. R. 391; *Flagstaff M. Co.* v. *Cullins*, 104 U. S. 176; civil engineer has no lien: *Penn. Ry.* v. *Leuffer*, 84 Pa. St. 168; master of vessel has no lien under maritime law: *Case* v. *Woolley*, 6 Dana, 17; 32 Am. Dec. 54.

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houses situate in the immediate vicinity of the mill, together with the land on which the mill and buildings stand; also upon Discovery claim, and claims numbered one, two, three, four and five, northeast from Discovery claim, and claims numbered one, two, three, four and five, southwest from Discovery claim, on the Rising Sun quartz lode, together with the privileges and appurtenances thereto belonging.

To bring himself within the statute giving a lien to mechanics, builders, lumbermen, artisans, workmen and laborers, who shall perform work and labor upon any building, erection, mining claim, quartz lode, etc., the plaintiff alleges that on the 28th day of December, 1874, the aforesaid corporation hired the plaintiff as its agent, manager and superintendent, to perform labor in and about the building, erection and completion of the mill and houses mentioned, and also in working the claims named on the quartz lode, at a salary of $250 per month.

Does this averment bring the plaintiff within the spirit and meaning of the Mechanics' Lien Law?

The purpose of the legislature in enacting this statute undoubtedly was to secure to the persons therein named compensation for their labor upon the erections therein contemplated, and within the scope of the statute. Its provisions should be liberally construed. It was designed for the protection of workmen who, by their labor or materials furnished, have called property into being or added to its value, to the end that the property itself should be held liable for the labor and materials that produced it. But it is not every one who contributes to the erection of a building or structure that is entitled to a lien thereon. If the contribution was indirect, as if A should loan money to B for the purpose of enabling him to erect a building, and he should, with the money thus loaned, employ workmen, purchase materials and construct a building, A could not hold a mechanic's lien on the building for the money so loaned. In order to have the lien attach the labor or materials must have been expended on the building itself, and not upon something else that produced it as a result.

From the nature of the plaintiff's employment, as averred by himself, it does not appear that he was an architect or

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laborer, or that he labored directly in the construction of the buildings, etc., but rather that he was employed by the corporation at a fixed salary to manage and superintend its affairs at the place named. Undoubtedly he had the general oversight of the business of the company, of the workmen employed to labor upon the buildings, etc., and probably kept an account of their time, saw that they performed good service and earned their wages, and at stated times paid them their money, for all of which he rendered an account to the company. His services were useful and necessary, but they contributed only in an indirect manner to the construction and erection of the buildings. He stood very much in the situation of an owner directing and managing works of his own. He was the representative of the corporation, and to the laborers under him he was the corporation at the place where the labor was performed. This was not the kind of service that entitles one to a mechanic's lien. This view of the case is in harmony with the decisions of the Supreme Court of the State of Missouri, from whence we obtained our Mechanics' Lien Law. In the case of *Blakey* v. *Blakey*, 27 Mo. 39, the plaintiff brought an action to enforce a mechanic's lien for work and labor done, and materials furnished in building a house for defendant. His account was as follows: "To 114 days' services of self in working and superintending building from May 1st up to December 23, 1856, at $3 per day, $342." In deciding this case the court says: "The law gives the mechanic, builder, artisan, workman, laborer or other person who may do or perform any work upon, or furnish materials for any building, a lien on the same to secure the payment of the work done or materials furnished, but it has no such elastic power as is claimed for it in this case, and it can not be stretched to cover, besides the value of the work done and materials furnished, a claim for services performed by the builder for himself in superintending his own workmen."

This superintendent stands in place of the corporation, and to give him a lien for the kind of labor he performed might defeat the liens of the workmen and material men who actually constructed the building, and would be like giving a lien to the corporation itself.

This case is not at all analogous to that of *Alvord* v. *Hen-*

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drie, 2 Mont. 115, decided by this court. In that case there had been a full and complete settlement between the parties, and the amount for which the plaintiff should have a lien upon the property for his labor thereon had been agreed on and determined.

An agent employed to disburse money and pay off hands in the building of a house has no lien for his services, as the statute was designed to protect the interest of a different class of persons from those agents employed to disburse money. Such services do not come within the spirit or letter of the act. *Edgar* v. *Salisbury*, 17 Mo. 271; Phillips on Liens, §§ 156, 157.

There is another question, not referred to in the briefs, worthy of great consideration, as to the validity of a joint lien upon separate and distinct parcels of property. See Phillips on Liens, § 376; *Steigleman* v. *McBride*, 17 Ill. 300; *James* v. *Hambleton*, 42 Id. 308.

The judgment below is affirmed.

Judgment affirmed.

BLAKE, J., did not sit in this case, being disqualified.

CAPRON v. STROUT.

(11 Nevada, 304. Supreme Court, 1876.)

Repeal of old and passage of new lien law. Where a new mechanics' lien statute contains all the provisions of the old act which it repeals, necessary to support a lien—it must be held that no intention existed to destroy existing rights.

The foreman of a mine is entitled to a lien.

Appropriation of payments. Where the foreman of a mine also boarded the employes and received money from time to time not exceeding his claim for board, without special appropriation of the fund to any particular item: *Held*, that he was not bound to apply it to the oldest claims but could credit it to the board account.

[1] **Hiring from month to month.** A general hiring of miners at a per diem to be paid monthly, is a hiring from month to month. Either party may terminate it at the end of any month without notice though work has been done under it for many successive months.

Miner's lien and intervening mortgage. Where a miner has been hired

[1] *Kansas Pac. Ry.* v. *Roberson*, 3 Colo. 142.

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for a month and continues to labor under the original hiring from month to month, his lien is subservient to an intervening mortgage from the end of the current month during which the mortgage was filed for record.

Time for filing lien notice. Where the work has been continuous the statutory notice is good if filed within the statutory period after the last work, although the work has been going on under sundry successive contracts.

Appeal from the District Court of the Sixth Judicial District, Eureka County.

The facts are stated in the opinion.

HILLHOUSE and DAVENPORT, for appellant.

THOMAS WREN, for respondent.

By the Court, BEATTY, J.

This is a suit to foreclose a mortgage given by Strout and Wermuth to the plaintiff. Robert Stuart was made a party defendant, and in his answer claimed a preferred lien upon the mortgaged premises under the provisions of the laws securing liens to mechanics, miners and others. The district court, in its decree, has allowed his claim, and the plaintiff appeals from the judgment upon the ground that the findings of fact do not support that part of the decree which gives priority to the miner's lien. The substance of that portion of the findings affecting the points to be here decided is as follows: Plaintiff's mortgage was recorded February 25, 1874. Stuart had commenced work on the mine June 24, 1873, as foreman, under a verbal contract with Strout and Wermuth, the mortgagors. No time was agreed upon that his work should continue. He was to receive eight dollars per day, payable monthly. His duties were to act as general foreman, to "boss" the men who were at work in the mine, keep their time, and give them orders for their pay at the end of each month. He continued in this employment without any further contract until May 21, 1875. He filed notice of his lien June 3, 1875. During his employment as foreman of the mine, he also boarded men for his employers and received money from them,

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not exceeding the amount due him on board account. No application of the sums so paid was made by either party, at the time, to any particular account, but when respondent filed his notice of lien he appropriated the amount he had received to the board account. Upon these facts the court concluded that the respondent was entitled to a preferred lien for his wages up to March 2, 1875, amounting to $4,080, and the decree directs that sum to be paid to him out of the net proceeds of the sale of the mortgaged premises, before anything is paid to Capron, the mortgagee.

The first objection of the appellant to this judgment is that the respondent's right to a lien for work done prior to March 2, 1875, was destroyed by the repeal on that day of the law by which it had been secured. But we think this point has been settled adversely to the claim of appellant by the decision of this court in the case of *Skyrme* v. *Occidental Co.*, 8 Nev. 219. In this case as in that, the repealing act contains all the provisions of the act repealed, which are necessary to support respondent's right to a lien, and it must be held, both on principle and authority, that the legislature never intended, by the repeal of the old law, to destroy existing rights: C. L., Sec. 126–140, and Stat. 1875, 122. The only effect of the new law, so far as this case is concerned, was to give Capron's mortgage priority to any lien for work done after its passage, and that effect is allowed to it in the conclusions and decree of the court.

The next point of the appellant is, that Stuart's employment was not of that kind that is protected by the lien law. It is said that he performed no work or labor in or upon the mine, and it is argued that the intention of the law was to secure those only who perform labor upon the mine with their hands; that to give it a wider construction, one that will make it include the wages of a foreman like Stuart, will make it cover the case of a general superintendent and other officers of a corporation, and thereby impair the remedy of those who are the special objects of the legislative care. We do not admit that no distinction could be made in this respect between a foreman of miners and the superintendent of a company, but whether there could or not, we have no doubt that respondent's claim comes within the spirit as well as the letter of the law. According to the findings, he certainly did work in the

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mine, though not with his hands, and it is clear that the direct tendency of his work was to develop the property. We think the foreman of work in the mine is as fully secured by the law as the miners who work under his direction.

Appellant next contends that the respondent had no right, as against him, to appropriate the money received from Strout exclusively to the board account, and that the court should make the appropriation to the oldest claims; that is, that it should be appropriated in part, at least, to the labor account. No reason is given and no authority is cited to sustain this proposition, and we think it can not be sustained. Clearly Strout and Stewart had the right to make appropriations without consulting Capron, and if Strout has no objection to the appropriation which Stuart has made, it is difficult to see upon what ground Capron can object.

The appellant complains that the findings and decree give the respondent a preferred lien for certain sums claimed by him under an agreement with Strout that his wages as foreman should continue during a period of thirty days that he was absent from the mine, and that his wages should be doubled for a period of four months if he had to file notice of lien or commence suit. It is unnecessary to express an opinion as to the right of a miner to a lien on the mine for wages not earned by labor on the mine, or for the amount of a penalty agreed upon in case of failure of prompt payment. It is sufficient to say that in this case the claims referred to do not appear to have been allowed as against Capron.

These points disposed of, we are brought to the most serious and important question involved in the determination of this appeal.

The appellant takes the ground that the contract under which Stuart commenced work did not cover all the time for which his wages are made a preferred lien and, consequently, that he has been allowed a preferred lien for work done on a contract or contracts made after notice of the mortgage. And he contends that although the work done by Stuart may have been continuous, if any of it was done on a contract made after notice of his mortgage, that as to such work his lien can not be preferred.

We think that both of these positions are correct. The

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original contract was for a month's service at most, and was renewed from month to month by the acts of the parties. In England it has long been settled that a general hiring of a domestic servant, without any specification of time, is a contract for a year's service, terminable on a month's notice from either party, and this rule of construction is founded upon the usage of the country. As to other classes of employes, however, there is no invariable rule, though a hiring for a year will be presumed in the absence of any special circumstance tending to prove that the contract was for a shorter term, but very slight circumstances will rebut the presumption. (See authorities collected in notes to 2 Chitty on Cont.; 11 American Ed. 840, *et seq.*) In this country the English rule does not prevail even in regard to the hiring of domestic servants, and as to miners or other laborers employed at so much *per diem*, payable monthly, there is no authority for holding that either employer or employe contracts for more than a month's service. Either party may terminate the employment at the end of the month, without notice and without incurring any liability to the other. But if the miner continues to work, nothing being said on either side, the law implies a renewal of the original contract, whatever it was, whether for a day, or a week, or a month.

Counsel for respondent argues that the finding of the district court that Stuart continued to work "without any further contract," is conclusive that his original contract covered all the work he did. But this position is clearly not maintainable. The finding referred to is one of fact, not a legal conclusion, and only means that Stuart continued to work without any express renewal or change of his contract. The legal conclusion which follows from this fact is, that the contract was renewed from month to month by tacit agreement, evidenced by the acts of the parties, this implication being founded upon the same considerations upon which a tenant who holds over is deemed to hold on the terms of the original demise. The truth, then, was, that every month Stuart worked he worked under a new contract, not express but implied.

There is a further reason why the original contract made on the twenty-fourth of June, 1873, can not possibly be held to cover any work done after June 24, 1874. If it had expressly

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provided for more than a year's service, not being in writing it would have been void (C. L. Sec. 289), and the law will not imply a contract which would be void if express. This consideration, however, is not the ground of our decision. It goes upon the ground that Stuart's employment was only from month to month. Capron's mortgage was recorded February 25, 1874, and all the work done by Stuart after the expiration of his then current month was done under contracts made by him after legal notice of Capron's rights, and his lien for such work is subordinate to Capron's mortgage. This construction of the lien law is obviously just and necessary. The language of the statute is: "And all liens herein provided for shall be preferred to every other lien or incumbrance which shall attach upon any property subsequent to the time when the work or labor was commenced," etc.

The question of construction is: What is the meaning of the words, "the work or labor?" What work is meant? Does the statute mean any work that may be done provided it be continuous from a date prior to notice of the mortgage, though partly under contracts made after notice of the mortgage, or does it mean the work already contracted for before notice of the mortgage? We think the whole spirit of the act requires that its meaning should be limited to the latter sense. And if this construction did not necessarily follow from the language of the act, we should feel bound nevertheless to give it that construction for the reason that this provision of our law is an almost literal copy of a corresponding provision of the California act of April 19, 1856, from which our law is borrowed, and that provision of the California law had been construed before its adoption in this State in the sense here attributed to it. See *Soule* v. *Dawes*, 14 Cal. 249; 7 Id. 575.

It does not follow, however, from these views, as contended by the appellant, that Stuart is not entitled to a preferred lien for the work performed under contracts made prior to notice of his mortgage, for the reason that he did not file notice of his lien within sixty days after the completion of those contracts. It was settled in the case of *Skyrme* v. *Occidental Co.*, above cited, and we think correctly settled, that when the work is continuous, though done under different contracts, the

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lien is preserved by giving notice within sixty days after the work is ended.

The judgment appealed from is reversed, and the cause remanded with the directions to the district court to modify the decree in accordance with the views herein expressed, and with costs to the appellant.

Judgment reversed.

VANDERGRIFT & FORMAN'S APPEAL.

(83 Pennsylvania State, 126. Supreme Court, 1876.)

Leaseholds, not "goods and effects." Oil leasehold interests and buildings on leaseholds are not goods and effects within the meaning of the act relating to foreign attachments; therefore, when the sheriff treated such property as personalty and returned that he had taken it into his actual custody, and in serving subsequent writs did not go again to the property but simply indorsed the writs and served a summons on the garnishees, such service was not a compliance with the act.

[1] **Mechanic's lien against oil well.** One who contracts to drill an oil well and to furnish the tools, ropes, fuel, etc., to be used in the drilling, can file a mechanic's lien against the well for the work so done and the materials furnished, under the provisions of the second section of the act of March 7, 1873.

Appeal from the Court of Common Pleas of Butler County.

This was an appeal from the decree of the court confirming the report of the auditor appointed to distribute the fund arising from the sale of the interest of W. W. Perkins in certain oil leases, oil wells, fixtures, machinery, etc., connected therewith, under two writs of *fi. fa.* issued by Vandergrift & Forman.

The facts in the main controversy before the auditor are fully set forth in the opinion of this court.

The only other question passed upon by this court was as to

[1] The torpedo man has a lien: *Gallagher* v. *Karns*, 27 Hun, 375.

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the right of D. C. Boyle to file a lien under the act of March 7, 1873 (Pamph. L. 219). The claim of Boyle was for a balance on a contract for drilling the U. P. well. By contract made in March, 1873, Boyle was required to drill said well to the oil bearing rock, furnishing tools, ropes and fuel for drilling of the same, for $3,400. He commenced work on the 24th of March, 1873, and completed the well on the 14th day of June following; received on contract $2,462.91, leaving balance $937.09 unpaid, for which he filed his lien. The other claimants to the fund objected to the allowance of this claim because Boyle was a contractor and therefore could not file a lien under the act of 1873.

The auditor allowed the claim, and the court below (BREDIN A. J.) sustained the allowance.

DODD & LEE, ASH & STERRETT, MCJUNKIN & CAMPBELL, for appellants.

CHARLES M'CANDLESS and JOHN M. THOMPSON, for appellees, except D. C. Boyle, for whom JOHN M. MILLER appeared.

MR. JUSTICE WOODWARD delivered the opinion of the court January 2, 1877.

Vandergrift and Forman, execution creditors of William Wallace Perkins, on the 13th and 15th of October, 1873, procured levies to be made on the defendant's property, which was sold by the sheriff on the 21st day of the same month. Except a lot of household goods in Fairview borough, which produced at the sale $108.50, the property consisted of undivided interests in five leaseholds in the township of Fairview, and two leaseholds in the township of Concord, with one or more producing oil wells, and the usual engines, engine houses, machinery and fixtures upon each. The aggregate sum of $9,951.50 was realized by the sale. Before the auditor appointed to distribute the fund, the main controversy arose between the execution creditors and the plaintiffs in numerous foreign attachments against Perkins, issued and alleged to have been served on the 3d and 6th of October, 1873. The sheriff returned in each case that he had taken into his actual

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custody the leasehold estates with the oil wells upon them and the appurtenant buildings and fixtures. In the case of John M. Thompson the return set forth: "I have also summoned T. B. Clark, H. W. Timblin, Allen Wilson and Vanorman, as garnishees." In the cases of Brooks & Co., W. H. McPherson, W. H. Timblin, Alexander McPherson, H. F. Westerman, and Timblin and Clark, the only garnishee summoned was W. H. Timblin. In Allen Wilson's case the garnishees were Allen Wilson, George V. Forman, J. J. Vandergrift, and the Fairview Pipe Line and Vandergrift & Forman Pipe Line consolidated. It was not shown in any one of the cases that the garnishees held under the defendant. The record shows that no actual service was made; but the court below held that, as the leaseholds had been seized and placed in the custody of Allen Wilson, under foreign attachments against A. W. Russell on the 10th of September, 1873, "the sheriff was not required to go again to the property itself; he had it already, and, as in case of levy, required only indorsements on writs; the service of summons on tenants and garnishees completed the attachment." It was alleged at the argument by the counsel for the appellants, that the facts were misconceived by the court so far as they related to the "U. P. well," which produced at the sale $3,550, and the "Toronto tract," which produced $2,550, neither of them having been seized under the attachments against Russell. In one of the suits—that of John M. Thompson—judgment was taken for want of an affidavit of defense, on the 30th of October, 1873. In all the others Mr. Thompson appeared as the attorney of the defendant on the 16th of December, 1873, and, with the consent of the attorneys for the plaintiffs, confessed judgments to the plaintiffs in the sums due to be liquidated by the prothonotary. $290.94 were distributed to the judgment of H. T. Westerman, which is shown by the record to be still unliquidated. $162.57 were distributed to Allen Wilson's judgment, in which a feigned issue has been awarded, and is still pending. On these facts the court below decreed the fund to the plaintiffs in the attachments, to the exclusion of the execution creditors.

Objection was made by the appellants to the distribution of the attaching creditors, on the ground that the writs had not been legally served, and no lien, therefore, had been acquired.

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Upon the assumption that the property seized, being chattels real, were such personal property as the legislature contemplated in enacting the 48th section of the act of 13th of June, 1836, the service of the writs was sustained by the court below as a substantial compliance with the statutory requirements.

The provision made by the 48th section for the service of a foreign attachment is as follows: "The officer to whom such writ shall be directed shall go to the person in whose hands or possession the defendant's goods or effects are supposed to be, and then and there declare, in the presence of one or more credible persons of the neighborhood, that he attaches the said goods and effects." By the 49th section of the same act it is directed that the execution of the attachment shall be as follows: "If the attachment be levied on houses, other buildings or lands, it shall be the duty of the sheriff to leave a copy of the writ with the tenant or other person in actual possession, holding under the defendant, and summon him as garnishee." Provision is made subsequently in the section for the attachment of a rent charge as a second class of real estate, and of other incorporeal hereditaments as a third class. For present purposes, the real estate subject to the operation of a foreign attachment are "houses, other buildings or lands." The personal property liable to seizure must consist of "goods or effects." The terms employed by the legislature in these two sections are exceptional and peculiar. The omission of the word "chattels" in the 48th section is significant. Throughout the act relating to executions, passed the same year with the act relating to the commencement of actions, which includes the provisions for foreign attachments, the words "goods and chattels" are used in describing and referring to personal property. More than that, the form of the writ prescribed by the 43d section of the act of the 13th of June, 1836, provides for the attaching of the defendant "by all and singular, his goods and chattels, lands and tenements." The change in the phraseology could not have been undesigned. The 50th section directs that the officer shall proceed to secure "the goods and effects" of the defendant, "if susceptible of seizure or manual occupation." To bring leaseholds of and buildings on leaseholds within a description implied in the

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words "goods and effects" would require a construction that would be forced and strained. Their meaning is free from all ambiguity or doubt, whether used in a popular, lexicographical, or a legal sense. The word "goods" is always used to designate wares, commodities and personal chattels. The word "effects" is the equivalent of the word movables. With the same obvious purpose in view, the 49th section defines the real estate which shall be subject to the operation of the statute to be "houses, other buildings or lands." In the case of a house or other building upon either a leasehold or a freehold, if a tenant or other person is in possession, holding under the defendant, the writ must be served on him. If no person is in possession, the writ must be advertised. There were buildings on all the leaseholds against which these attachments were issued, and persons were in possession who were returned by the sheriff as having been summoned. But the record does not show that they were tenants, or held under the defendant. Indeed the returns were avowedly made upon the assumption that it was personal property that had been seized, for a taking by the sheriff into his actual custody was alleged. Such a return to a *fieri facias* would be unsustainable. It was held in *Titusville Novelty Works' App.*, 27 P. F. Smith, 103, that a leasehold, being a chattel real, can be seized and sold only as real estate, not as personal goods capable of transportation, and that the levy upon it can be only by description of the realty out of which it is carved. In delivering the opinion of this court, GORDON, J., said that "a lease of land during the term is as fixed as the land itself, for it can only be used upon the land out of which it arises. It is nothing more or less than a right to use the freehold for the term mentioned in the lease. It is therefore an estate in land."

That property of the character of that which was here attached could not safely be held liable to actual seizure and manual occupation, is a proposition that demands no elaboration. The defendant had an undivided interest in these leaseholds. Their management required the employment of clerks and laborers, contracts for machinery and supplies, the transportation of the products of the wells, and the keeping of complicated accounts with producers, carriers and partners. Such disputes respecting ownership as are alleged to be

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existing here could readily arise. The effect of the establishment of a rule by which the decree of the court below would be sustained, could readily be conceived upon large manufacturing establishments erected upon leased lands, such as sugar refineries, distilleries, iron furnaces and rolling mills. If the sheriff, under a writ against the owner of an undivided interest, could take such structures into his "actual custody," and provide for and control their business during the pendency of a protracted litigation, the foreign attachment would become the surest and swiftest possible means of insuring the ruin of the proprietors and the destruction of the business. And in no case that could be supposed would disaster be more certain and more utter than in the case of such property as that out of the sale of which this fund was raised.

Nothing would be gained by an inquiry into the validity of the service of these attachments, if the property against which they were issued had been personal within the meaning of the statute. It is enough to say that they were not legally served against "houses, other buildings or lands." The consequence of the defect is obvious. The lien provided by the 51st section of the act was not created for the benefit of the plaintiffs. In a *per curiam* opinion in *Hayes* v. *Gillespie*, 35 Pa. St. 155, it was said that, "in so severe a proceeding as a foreign attachment, we can not doubt that the prescribed form of serving the writ must be strictly pursued." And in a note to that case, the opinion of Sharswood, P. J., in *Lambert* v. *Challis*, in the District Court of Philadelphia, was reported, where it was decided that the property attached could not be held when the service was defective.

The conclusion thus reached upon the main question in issue between the appellants and the attaching creditors obviates the necessity for an examination of the merits of the subsidiary points presented by the record.

A fair construction of the second section of the act of the 7th of March, 1873, would seem to justify the appropriation that was made to D. C. Boyle's mechanic's lien. The text of the section is, "All persons doing work for, on or about the erection, construction or repair of any engine, engine-house, tanks, derrick, building, machinery, wood or iron improvement, erected, constructed or repaired upon any leasehold es-

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tate, or for boring, drilling or mining on said lease or lot for the development or improvement of the same, whether such labor is or may be done by the day, month or year, or by contract for the tenant or tenants, lessee or lessees of such lot or lease of parcel of land, or for their use and benefit, shall have a lien upon the personal property and fixtures on said lot or lease of ground, and upon such lot or leasehold itself for the price and value of such work and labor." Boyle's work was done under a contract. Partial payments had been made, and the auditor gave him the residue. The statute directs that "the price and value" of the work shall be the measure of the laborer's right of lien, and here this price and value were fixed by the contract which the act in terms protects.

Decree reversed at the costs of the plaintiffs in the foreign attachments, and record remitted for re-distribution in accordance with the conclusions of this opinion.

BARNARD, Administrator, v. MCKENZIE.

(4 Colorado, 251. Supreme Court, 1878.)

[1] **No lien for hauling quartz.** A mechanic's lien will not lie for hauling ores from a mine to a quartz mill. The statute contemplates a lien only for such labor or material as may have been performed or furnished in the development, improvement or conservation of the mine, which has become incorporated with and constitutes a part of its value.

Equitable construction. Notwithstanding the mechanic's lien was unknown to the common law, yet in view of the equitable character of the statute, it should be liberally construed, but can not, by construction, be extended to cases not provided by the statute.

Proceedings strictly statutory. The proceeding to enforce a mechanic's lien is purely statutory, and the court has no authority to enter up a decree for a part of the claim, independent of the petitioner's right to a lien.

Appeal from District Court of Lake County.

The facts are sufficiently stated in the opinion.

Messrs. MILLER & CLOUGH, for appellant.

[1] See *Hope M. Co., in re*, 9 M. R. 364.

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Mr. CHARLES S. THOMAS, for appellee.

ELBERT, J.

This was a petition to enforce a mechanic's lien on the Berry tunnel, under the provision of the lien law of 1872: Sess. Laws, 1872, p. 147.

Section four of the act provides, that "all miners, laborers and others who work or labor to the amount of twenty-five dollars or more, in or upon any mine, lode or deposit, yielding metals or minerals of any kind, or upon any shaft, tunnel, adit or other excavation designed or used for the purpose of draining or working any such mine, lode or deposit, and all persons who shall furnish any timber or other material to the amount of twenty-five dollars or more, to be used in or about any such mine, lode or deposit, shall have and may each respectively claim and hold a lien upon such mine, lode or deposit, for the amount and value of the work or labor so performed or material furnished, by filing in the county clerk and recorder's office of the county in which such mine, lode or deposit is situated, within forty days after the time when the last work or labor was performed, or the last materials were furnished by him, a statement as required by section two of this act."

The answer of the defendant Bruce admits the filing of a statement by McKenzie, the lien claimant, under the provisions of the act.

McKenzie's employment appears to have commenced in November, 1875, and continued until the 29th of June, 1876, at which time the last work was done. His claim is for $518, in some part for material furnished, but chiefly for work and labor in *hauling ores* from the mine. The evidence discloses that there was no material furnished nor work or labor performed by McKenzie, in or upon the mine after the 15th of June, 1876, except *hauling ores* from the mine to the stamp mill.

The statement was filed July 27, 1876, and was not within the forty days limited by the act, unless we can say that one who is employed to haul ore from a mine, after it has been taken from the shaft or tunnel, is entitled to a lien under the provisions of the section cited.

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Laws giving the mechanic and material man a lien on real property their labor or capital has contributed to improve and enhance in value, are founded in manifest equity. Such legislation is in behalf of a large and meritorious class, poorly able as a rule to sustain loss, and little qualified to secure themselves against it by safeguards of their own suggestion.

Notwithstanding the lien was unknown to the common law and is purely the creature of the statute, in view of its equitable character, we think the statute giving it should be liberally construed so as to advance its objects.

The lien, however, is purely statutory and can not be extended by construction to cases not provided for by the statute.

The mechanics' lien laws of the several States of the Union are in their main provisions substantially similar. The leading idea is to secure the mechanic and material man upon values they have directly contributed to create.

Says Mr. Phillips: "The lien of the mechanic * * * is a remedy in the nature of a charge on land, given by statute to the persons named therein to secure a priority or preference of payment for the performance of labor or supply of materials to buildings or other improvements, to be *enforced against the particular property in which they have become incorporated* in the manner and under the limitations therein expressly provided." Phillips on Mechanics' Liens, 15.

Courts have construed these statutes most liberally, so as to include incidental labor where it has become incorporated with and contributed to the value of the property sought to be charged with the lien.

In the case of *Hill* v. *Newman*, 38 Pa. St. 151, the statute was held to include the work of a teamster who had hauled the lumber used in the erection of a building.

In the case of *Knight* v. *Norris*, 13 Minn. 473, the statute was held to include the architect who furnished plans and specifications for and superintended the work.

But in each of these cases the lien was for work and labor which became incorporated with and a part of the property sought to be charged with the lien.

The lien provided for by section 4 above quoted is for work and labor "in or upon any mine, lode or deposit," and for materials furnished "to be used in or about any mine, lode or

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deposit." This language fixes clearly the relation which the work and labor must sustain to the property sought to be charged. It contemplates only such labor or material as has been performed and furnished in the development, improvement or conservation of the mine, which has become incorporated with the mine and constitutes a part of its value. To give a lien for work or labor not performed, in the language of the section, "in or upon the mine," would not be construction, but judicial legislation. The hauling of ores by the petitioner from the mine to the quartz mill can in no just sense, within the meaning of this statute, be regarded as work and labor performed "in or upon the mine." His labor so performed has in no degree become incorporated with it, or *per se*, enhanced its value. The equity upon which the lien is founded does not exist. He could as well ask it upon any other property of the defendant.

As to two hundred and thirty-three dollars of the petitioner's claim, the court below decreed a lien; and as to two hundred and eighteen dollars of the claim it entered a separate decree of indebtedness and awarded execution thereon.

The proceeding to enforce a mechanic's lien is purely statutory, and we know of no provision which can be construed to authorize the court to enter up a decree for a part of the claim independent of the petitioner's right to a lien.

The decree of the court below is reversed and the cause remanded.

Reversed.

KEYSTONE MINING CO. ET AL. v. GALLAGHER ET AL.

(5 Colorado, 23. Supreme Court, 1879.)

Jurisdiction of county courts. The extent of the jurisdiction of the county courts as to their pecuniary limit in suits to enforce lien claims, is to be measured by the amount involved in each claim severally, and not the aggregate of all the claims presented against the same property. Where no one claim exceeds $2,000 in amount, any number of claims may be adjudicated in the same proceeding.

Lien relates to date of first item. The legal effect of the latter clause of

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section seven of the act of 1872, is to give the mechanic, laborer or material man, a lien from the date of the *commencement* of the labor or the furnishing of the materials.

County succeed probate courts. Under the provisions of section nine of the schedule of the constitution, the county courts, created by the constitution, were, immediately upon the adoption of the constitution, clothed with all the powers theretofore possessed by the probate courts.

[1] **Improvements feed the lien.** A house built for the use of the mine and being part of the mining property, may be sold with the mine for the purpose of enforcing a lien under the statute.

Powder, steel and candles, furnished for the use of the mine, *held*, to be clearly within the meaning of the statute, and materials for which a lien may be enforced.

Service by publication. Want of *personal* service and the non-appearance of a defendant, in an action to enforce a lien claim, will not vitiate a decree against such defendant, although before the commencement of the suit he had parted with his interest.

Manner of sale. The statute provides that the premises may be sold within the time and in the manner provided for sales on execution issuing out of any court of record.

Error to the County Court of Boulder.

On February 14, 1877, Gallagher filed his petition in the County Court of Boulder County for a mechanic's lien. The petition stated substantially that on the first day of August, 1876, and thence until the 15th day of December of the same year, James W. Strong was the owner of the Keystone lode, situated in Magnolia mining district, in Boulder county; that Strong employed the petitioner to do certain work in developing said lode, and that the work was done by the petitioner between the first and fourteenth of September, 1876; also that Strong employed the petitioner on the 14th of September, 1876, to work by the day on said lode, and that he performed labor upon said lode until the 14th day of December, 1876. That Strong was indebted to him for said work, etc., and that on the 15th day of December, 1876, Strong conveyed the property to the Keystone Mining Company, and that the said company was the owner of the property at the time of filing his petition, on the 22d day of January, 1877. That on said last mentioned date, notice and statement were filed in the office of the county clerk that William Gillett and others claimed to have liens, and prayed that they be made de-

[1] *Roberts* v. *Dauphin Bank*, 6 M. R. 54; *Hayes* v. *New York M. Co.*, 2 Colo. 273.

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fendants, and that he might be decreed to have a lien, etc., for the balance of the amount, $148.31, alleged to be due him. Summons was issued, returnable to the April term, 1877. Some of the defendants not being served, publication was had. Appearance was entered and answers put in for the various defendants, except Strong, who was defaulted June 21, 1877, and the cause referred to a special master to take proofs. Upon the coming in of the master's report, on the 25th day of June, 1877, a decree was entered in favor of the several claimants, exceeding in the aggregate the sum of $2,000, and for a lien upon the premises in question. It was also ordered that the several sums, with interest from the date of the decree at ten per cent. per annum, be paid by July 25, 1877, and, in default, that the master should make sale of the property on the 25th of August, 1877, upon not less than twenty days' notice. To reverse this decree, the Keystone Mining Company sued out a writ of error.

W. A. HARDENBROOK, for plaintiffs in error.

BUTLER & WRIGHT, BLAKE, WHITELAY and NORTH, for defendants, in error.

STONE, J.

The aggregate amount of the several sums found due the defendants in error as lien claimants, exceeded two thousand dollars; and it is assigned for error, that, under the constitutional limitation of the jurisdiction of county courts to two thousand dollars, as to the amount claimed, the court below was without jurisdiction to render the decree. We can not regard the decree as open to this objection. The demands of the lien claimants are several in their nature, and in the mode of their enforcement. Each files his separate statement as the statute requires. Each presents his separate petition to enforce the lien, and therein sets out his particular cause of action. The individual claim of no one exceeds the sum of two thousand dollars. The court renders a decree several as to each claimant, and so long as no one claim exceeds two thousand dollars, it is no objection that the aggregate amount of

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all the claims is in excess of that sum. Each claim so presented is in its nature a several and distinct action, but in order to avoid a multiplicity of writs, sales and costs, and to prevent preferences among lien claimants arising from priority of decrees, sales and payments, the statute has provided a mode of enforcing these several rights, whereby all the claims may be heard and determined in nominally one proceeding, adjudicated at one time, and enforced under one decree; a mode which was evidently intended to be the most equitable and the least expensive. In the case of *Powers* v. *McCord*, 36 Ill. 221, the court, in discussing the provisions of the statute requiring the court to ascertain the amount due each creditor, and to direct the application of the proceed of sales, say, "These provisions are peremptory, and the court, on the trial, must ascertain the sum due to each claimant before a decree is rendered, directing the sale of the property, and the application of its proceeds to the claimants in proportion to the amount found due to each, if not sufficient to pay all of their claims. It may be and perhaps is the better practice, to impanel a jury to pass upon and find the amount due each claimant, *as though they were separate proceedings*. But where there are but few parties, and the claims are not complicated, no objection is perceived to submitting the whole case to the same jury; but a final decree, ordering a sale of the property, should not be rendered until the sum due each of the claimants is ascertained. Then their several rights should be declared in the decree, and the property sold, if payment is not made by the day fixed in the decree, to satisfy the sums due to the several claimants."

We think the intent of the statute is manifest and that it was competent for the legislature to provide that any number of claims against the same property, where no one exceeds $2,000 in amount, may be adjudicated in one proceeding without infringing the constitutional limitation referred to. In this view, we think the extent of the jurisdiction of county courts as to their pecuniary limit in these cases, is to be measured by the amount involved in each claim severally, and not the aggregate of all the claims presented against the same property. The record shows that the property, previous to December 15, 1876, was owned by one Strong and others, by whom the claimants were severally employed to do the work and furnish the ma-

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terials for which the liens were claimed, that such work was continued up to the said 15th day of December; that on that date the property was purchased by the Keystone Mining Company, to whom it was conveyed by good and sufficient deed, and that the lien "statements" of all the claimants were filed with the county clerk in the manner provided by statute in the following month, January, 1877. Upon this state of facts, it is claimed by plaintiffs in error that no valid decree could be rendered against the Keystone Mining Company, for the reason that at the time the property was conveyed to the company there were no liens in existence; that such liens only attach from the date of filing the statements required by statute. This construction can not be given to our statute, The identical point has been passed upon by this court in the case of *Mellor* v. *Valentine*, 3 Colo. 258, where it is held that the legal effect of the latter clause of section 7, of the act of 1872, which declares that "all liens herein provided for shall be preferred to every other lien or incumbrance which shall attach upon any property, made subject thereto subsequent to the time when the work or labor was commenced, or the first of the materials furnished, and also to all mortgages and incumbrances unrecorded at the time such work or labor was commenced, or the first of such materials were furnished," etc., is to give the mechanic, laborer or material man a lien from the date of the *commencement* of the labor or the furnishing of materials. The same construction and legal effect is given to a similar provision of a statute by the Supreme Court of Iowa, in the case of *Monroe* v. *West*, 12 Iowa, 121. See also Phillips on Mechanics' Liens, Sec. 228.

Another point made by counsel for plaintiffs in error is, that the county courts, being created by the constitution, were without jurisdiction except such as given by the constitution expressly in relation to the estates of deceased persons, until further powers were conferred by law, which was not done until the acts of the General Assembly of the State in relation thereto took effect, June 22, 1877. This position is untenable, not because of the provisions of Sec. 8 of the schedule, cited by counsel, and which we conceive does not confer the jurisdiction claimed by such courts prior to June 22, 1877, but by the provisions of Sec. 9 of the schedule of the constitution,

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which are that "The terms 'probate court,' or 'probate judge,' whenever occurring in the statutes of Colorado Territory, shall, after the adoption of this constitution, be held to apply to the county court or county judge, and all laws specially applicable to the probate court in any county shall be construed to apply to and be in force as to any county court in the same county until repealed." Under this provision, upon the adoption of the constitution the county courts created thereby were immediately clothed with all the powers theretofore possessed by the probate courts.

All the lienors except Blodgett claim for work done and materials furnished in the mine and for the working of the mine directly. Blodgett's claim is for furnishing the materials for and building a house or shop contiguous to the mine, and built for the use of the mine under the direction of the mining superintendent. The house was owned by the owners of the mine, and was a part of the mining property; and we see no error in the decree in favor of Blodgett, and for the sale of the house together with the mine, for the purpose of enforcing the liens.

The proofs to establish the claims of Coan and Gillet, were sufficient to warrant the decree as to them respectively.

It is objected that the decree, as to Boettcher's claim, is erroneous, because the articles furnished by him were not of the character comprehended by the lien law specifying "timber or other materials to be used in or about the mine." The testimony shows that the articles furnished were powder, steel, and candles, for the use of the mine. These articles are as clearly within the meaning of the statute as anything we can conceive of essential to the working of a mine.

That Strong was not personally served, and did not appear, is no ground of error in the decree. Service as to him was made by publication, in accordance with the statute providing for such case. The only other assignment of error necessary to notice is, that the decree provided for a sale in less than ninety days.

The act under which the proceedings were had provides that the premises may be sold within the time and in the manner provided for sales on executions issued out of any court of record. That the sale was made in accordance with

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the statute appears by the record. The regularity of the decree in this respect, therefore, can not be questioned. The Illinois cases cited by counsel upon this point are not apt, inasmuch as the sales referred to in those cases were fixed by the lower court in its discretion, and the Supreme Court held that in the absence of statutory provision governing the length of notice, the time should not be less than ninety days, that being the ordinary lifetime of an execution in chancery proceedings in that State.

There being no error in the proceedings, the decree of the court below is affirmed.

Decree affirmed.

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[1]CULLINS, Respondent, v. THE FLAGSTAFF SILVER MINING CO., Appellant.

(2 Utah, 219. Supreme Court, 1877–80.)

Lien of superintendent. The general superintendent of a mining company is a laborer within the intent and meaning of the Miner's Lien Law.

Scope of the Lien Law. The Mechanics' Lien Law is not intended for the poorer class of laborers only, but is for the benefit of all persons who can bring themselves within its provisions.

Facts of the case. A was employed by a corporation to direct the work in its mine, with authority to employ and discharge miners, and procure and purchase supplies. It was also his duty to plan, oversee and direct the work in said mine, direct the shipment of ore, and generally to control the actual working and development of the same. *Held*, that he was entitled to a mechanics' lien.

Appeal from the Third District Court.

The facts appear in the opinion of the court.

J. R. MCBRIDE, for appellant.

The lien law, upon which this issue is based, will be found on pp. 386, 399, Revised Statutes of Utah, and the same being

[1] Affirmed, 104 U. S. 176.

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in derogation of the common law must be strictly construed: 1 Cal. 185; 2 Cal. 90; 29 Cal. 286.

The law was intended for the benefit of laboring men. It appears from the record that plaintiff was the mining superintendent of defendant, whose duty was, not to labor in defendant's mine as a laborer, but generally to watch over defendant's business at the mine, as well as purchasing in the markets the supplies therefor, and as such is not entitled to any lien or preference on the property of defendant over its other creditors: 2 Cal. 91; 40 Cal. 187; 27 Mo. 39; 2 Mon. 443.

BENNETT & HARKNESS, for respondent.

A superintendent or foreman of the work is as necessary to the development of a mine as the labor of a common miner.

In the following cases the lien law has been held to include the architect and the cost of boarding laborers: *Bank* v. *Gries*, 35 Pa. 423; *Lybrandt* v. *Eberly*, 36 Pa. 347.

The case of *Smallhouse* v. *K. & M. M. Co.*, 2 Mont. 443, does not seem to be analogous. The decision is put on the ground that the claimant was the representative and stood in the place of the company in the business, and hence could not have a lien.

In this case the complaint and findings both show the plaintiff was not the general agent or manager of defendant's business, but an employe engaged by and acting in a limited employment under such general manager. Assuming, therefore, that both the Nevada and Montana cases are rightly decided, the rule would be that if the claimant is the representative and stands in the place of the company in the business, he has no lien; if he is strictly an employe he has a lien, though in the course of his duty as an employe he may be required to direct the work of other employes. If this be the rule the judgment must stand, because it will be presumed the evidence showed such a state of facts as to fully justify the finding.

EMERSON, J., delivered the opinion of the court.

This action was brought to enforce a miner's lien against the defendant corporation, and the only question in the case

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is whether the respondent, being superintendent or foreman of the defendant's mine, is he, in the sense of the mechanics' and miners' lien law of this Territory, a laborer, so as to entitle him to lien on the mine?

Section 1221 of the Compiled Laws provides that: "Any person or persons who shall perform any work or labor upon any mine, or furnish any material therefor, in pursuance of any contract made with the owner or owners of such mine or of any interest therein, shall be entitled to a miner's lien for the payment thereof, upon all the interest, right and property in such mine by the person or persons contracting for such labor or materials at the time of making such contract; said lien may be enforced in the same manner and with the same effect as a mechanic's lien, as provided by the laws of Utah." It is upon the construction to be given to this language that the court is called upon to pass.

The court below found that the plaintiff was employed by the defendant corporation "to direct the work in the said mine, with authority to employ and discharge miners, and procure and purchase supplies for working said mine, and that it was the duty of the plaintiff, by virtue of said employment, to plan, oversee and direct the work in said mine, direct the shipping of ore, and generally to control and direct the actual working and development of the mine," and that the notice of intention to hold a lien upon the mine was regular and sufficient.

It is claimed that, as the law giving liens must be strictly construed, the plaintiff, by virtue of his employment, does not come within the description of those who are entitled to the benefit of the act. From the nature of the plaintiff's employment and the relation in which he stood to the other laborers, it is clear that his employment was in view of his especial ability and fitness to direct the work on the mine. It was such as a skilled laborer only would be employed to perform. The legislative intent in giving the lien was not, as was claimed by the appellants, for the poorer class of laborers alone, but was for the benefit of all those who could bring themselves within its purview, and from the nature of their employment receive the benefits it confers, without regard to their pecuniary condition. We have no doubt what the plaint-

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iff claims comes within the very letter of the law, as well as within its spirit. He was as much an employe of the appellant as any laborer on the mine, and if at all competent for the position assigned him by his employers contributed more than any other one to the development of the property: *Capron* v. *Strout*, 11 Nev. 310.

The case of *Smallhouse* v. *Kentucky M. Co.*, 2 Mont. 443, cited by appellants, is not analogous to the case now under consideration. It seems that the person seeking to enforce a lien in the case referred to, was the general manager of the corporation in all its business, at the place where it was carried on; and, as was stated in the opinion, he was not an architect or laborer, and did not labor directly in the construction of the buildings, etc., "but rather that he was employed by the corporation, at a fixed salary, to manage and superintend its affairs at the place named." In the case at bar it was the plaintiff's duty, among other things, to direct the work in the mine, and, according to the findings, he "performed said duties, and in the performance thereof did some manual labor." Even if this latter clause had not been in the findings, yet the facts as found make him such a laborer upon the mine as to entitle him to the benefit of the act.

The judgment of the lower court is affirmed.

SCHAEFFER, C. J., and BOREMAN, J., concurred.

DICKENSON ET AL. v. BOLYER ET AL.

(55 California, 285. Supreme Court, 1880.)

[1] **Work on house and tunnel on same claim.** Where work has been performed upon a dwelling house situate upon a certain mining claim, and upon a tunnel and other portions of the same claim, it is work done upon the same piece of property, and does not come within the terms of the Code, section 1188, requiring work to be apportioned where done on two or more separate parcels.

Appeal from a judgment for the plaintiffs, in the Twenty-first District Court, County of Plumas. CLOUGH, J.

[1] *Peck* v. *Standart*, 1 Ill. App. 228; *Helm* v. *Chapman*, 5 Pac. Rep. 352.

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J. S. CHAPMAN and J. D. GOODWIN, for appellants.

W. W. KELLOGG, for respondents.

Ross, J.

The plaintiffs performed certain work for the defendant Bolyer, upon a dwelling house situated on a certain mining claim, and also in and upon a tunnel and other portions of the mining claim. For the amount due for the work so performed, the plaintiffs filed in due time their claim of lien, and brought the present action to enforce it. The defendants Thompson and Kellogg, to whom Bolyer executed a mortgage upon the premises after the filing of the laborers' claim of lien, appeal from the judgment of the court below foreclosing the latter, on the ground that inasmuch as the claim of lien filed by the plaintiffs did not designate the amount and value of the work performed upon the dwelling house, and the amount and value of that performed upon the tunnel and other portions of the mining claim, the lien of the plaintiffs should have been postponed to the appellants' mortgage, by virtue of § 1188 of the Code of Civil Procedure, which reads as follows: "In every case in which one claim is filed against two or more buildings, mining claims, or other improvements owned by the same person, the person filing such claim must at the same time designate the amount due to him on each of such buildings, mining claims, or other improvements, otherwise the lien of such claim is postponed to other liens. The lien of such claimant does not extend beyond the amount designated, as against other creditors having liens, by judgment, mortgage or otherwise, upon either of such buildings or other improvements, or upon the land upon which the same are situated.

We think appellants do not correctly construe this section. It plainly applies only to cases in which one claim is filed against two or more *separate and distinct* "buildings, mining claims, or other improvements owned by the same person," and not to a case where, as here, all of the work was performed upon one and the same piece of property, although upon different portions of it.

Judgment and order affirmed.

MCKINSTRY, J., and MCKEE, J., concurred.

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Delaware, Lackawanna and Western Railroad Co. v. The Oxford Iron Co.

(33 N. J. Eq. 192. The Court of Chancery, 1880.)

[1] **Lien of laborers against insolvent corporations.** Under the act providing a special lien for laborers, in cases where corporations become insolvent, the lien comes into existence as of the date which the court fixes to be the time when the insolvency occurred, and applies only to laborers at that time in their employ, and does not cover an outstanding unpaid claim for labor by a former employe.

The presentation of a claim embracing items other than charges for wages, does not work a forfeiture of the right of lien for the wages, given by the statute.

Lien covers old debts for wages. The laborers in the employ of a corporation, at the time of its insolvency, have a lien upon the assets thereof for the whole amount of wages due to them, respectively, no matter how long before the date of insolvency the wages may have accrued.

The acceptance of a promissory note, without security, does not operate as a waiver of the lien given by the statute, unless an intention to relinquish such right is unmistakably manifested.

Interest not covered. The lien given for wages does not include interest which has accrued thereon before the lien attaches.

Proving claim in excess. The proving of a claim for a sum in excess of the amount really due does not work a forfeiture of the right to the lien.

On exceptions by the receiver to claims for wages presented against the Oxford Iron Company.

Mr. Flavel McGee, for receiver.

Mr. Henry S. Harris, for claimants.

[1] Note.—Ordinarily, a servant is not entitled to a lien or preference in payment for his services: *Hoover* v. *Epler*, 52 Pa. St. 522; *Lewis* v. *Patterson*, 20 La. Ann. 294; nor the officers of a corporation: *Croton Ins. Co. Case*, 3 Barb. Ch. 642; nor tort-feasors: *Dwinel* v. *Fiske*, 9 Me. 21; *Madden* v. *Kempster*, 1 Camp. 12; *Lempriere* v. *Pasley*, 2 T. R. 485; *Hotchkiss* v. *Hunt*, 49 Me. 213; see *Hamilton* v. *Buck*, 36 Me. 536; *Dorsey* v. *Langworthy*, 3 Greene (Ia.), 341; nor a creditor on his debtor's chattels in his possession: *Allen* v. *Megguire*, 15 Mass. 490; *Brewer* v. *Pitkin*, 11 Pick. 298; *Owen* v. *Dixon*, 17 Conn. 492; *Bailey* v. *Ross*, 20 N. H. 302; see *St. Louis* v. *Regenfuss*, 28 Wis. 144.

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The VICE-CHANCELLOR. (VAN FLEET.)

To a large number of the claims for wages exhibited against the Oxford Iron Company, and in behalf of which liens are claimed under the sixty-third section of the Corporation Act, the receiver excepts, denying that they are entitled to the preference given by that section. The questions raised by these exceptions have been informally brought before the court by agreement of counsel, and fully discussed. I shall dispose of them in the order in which they were discussed. The first relates to the time when it must be adjudged the right of lien accrues, whether that time shall be held to be fixed when the fact of insolvency actually occurs, no matter how long that may be before legal proceedings are instituted, or not until the fact of insolvency is judicially ascertained.

The section is in these words:

"In case of the insolvency of any corporation, the laborers in the employ thereof shall have a lien upon the assets thereof for the amount of wages due to them respectively, which shall be paid prior to any other debt or debts of said company; and the word 'laborers' shall be construed to include all persons doing labor or service of whatever character, for or as workmen or employes in the regular employ of such corporation." Rev. 188.

Within the meaning of statutes giving—(1) servants, (2) laborers, (3) employes, (4) mechanics, (5) artificers and (6) operatives—preferences for wages for work done, the following have been deemed (1) SERVANTS: An overseer and bookkeeper: *Hovey* v. *Ten Broeck*, 3 Roberts, 316; a superintendent: *Wickham* v. *Hardy*, 5 Jur. (N. S.) 871; *Cumberland R. R.* v. *Slack*, 45 Md. 161; an assistant superintendent: *Vincent* v. *Bamford*, 1 Jon. & Spen. 506; see *Bryan* v. *State*, 44 Ga. 328; a mining boss: *Del. Canal Co.* v. *Carroll*, 11 M. R. —; a civil engineer: *Williamson* v. *Wadsworth*, 49 Barb. 294; see *Calahan* v. *B. & M. R. R.*, 23 Iowa, 562; *Pa. R. R.* v. *Leuffer*, 84 Pa. St. 168; a clerk and foreman: *ex parte Humphreys*, 3 Deac. & Chit. 114; *Salina* v. *Seitz*, 16 Kan. 143; *Abbott* v. *Steam Packet Co.*, 4 Md. Ch. 310; a traveler engaged at an annual salary: *ex parte Neale*, 1 Mont. & Mac. 194; see *Reg.* v. *Tite*, Leigh & Cave, 29; *Reg.* v. *Negus*, L. R. (1 C. C.), 34; the mate of a vessel: *ex parte Homborg*, 6 Jur. 898; the housekeeper of a hotel: *Lawler* v. *Linden*, Ir. L. R. (10 Com. Law), 188; a bar-keeper: *Boniface* v. *Scott*, 3 Serg. & Rawle, 351; a journeyman: *Hart* v. *Aldridge*, Cowp. 54, Lofft, 493; see *Landry* v. *Blanchard*, 20 La. Ann. 173; *ex parte Gordon*, 1 Jur. N. S. 683; *Jobsen* v. *Boden*, 8 Pa. St. 463; Phillips on Mech. Liens, § 50; a designer: *ex parte Ormerod*, 1 D. & L. 825; an oven-placer in a pottery: *Willett* v. *Boote*, 6

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That part of the section which creates a lien is practically a transcript of the forty-second section of the act authorizing the establishment of manufacturing corporations: Nix. Dig. (4th Ed.) 539. The proper construction of the section last mentioned, so far as it affects the question under consideration, was settled in *Bedford* v. *Newark Machine Co.*, 1 C. E. Gr. 117. The purpose of both being the same, and their language being identical, a judicial construction of one determines also the meaning of the other. The case just cited, I understand, settles two propositions: first, that a person not in the employ of the corporation at the time it becomes insolvent is not entitled to the benefit of the statute, and second, that the insolvency meant in the act is that ascertained by the court as the ground of its jurisdiction. Until a corporation becomes insolvent, and this fact is laid before the court in the regular method of procedure, it has no authority to interfere with the corporation. Until insolvency is charged against it, in legal form, the court is bound to presume it was solvent. Upon this point, Chancellor Green, in the case just cited, said that the statute looks to the insolvency which leads to the proceeding resulting in a judicial determination of insolvency. He further said: "The court can not, upon an inquiry of this nature (and the inquiry then before the court was as to who was entitled to this lien), undertake to investigate the financial

H. & N. 26; a clerk whose wages are not all due: *Thomas* v. *Williams*, 1 A. & E. 685.

(2.) Laborers: A railroad workman with his team: *Warner* v. *Hudson River R. R.*, 5 How. Pr. 454; but as to the team, see *Atcherson* v. *Troy R. R.*, 6 Abb. Pr. (N. S.) 329; *Barnard* v. *McKenzie*, 9 M. R. 403; *Hill* v. *Newman*, 38 Pa. St. 151; *Heebner* v. *Chave*, 5 Pa. St. 115; *Wentroth's Appeal*, 82 Pa. St. 469; *Hope Mining Co.*, 9 M. R. 364; *Coburn* v. *Kerswell*, 35 Me. 126; *McCrillis* v. *Wilson*, 34 Me. 286; *Balch* v. *N. Y. & O. R. R.*, 46 N. Y. 521; *Brusie* v. *Griffith*, 34 Cal. 302; *Branin* v. *Conn. R. R.*, 31 Vt. 214; a laborer, although also a mechanic: *Adams* v. *Goodrich*, 55 Ga. 233; see *Myers* v. *Buchanan*, 46 Miss. 397; hoisters of materials: *Tizzard* v. *Hughes*, 3 Phila. 261; one employed by the owner to cook for his workmen: *Young* v. *French*, 35 Wis. 111; *contra*, *Sullivan's Appeal*, 77 Pa. St. 107; *McCormick* v. *Los Angeles Co.*, 40 Cal. 185; a pilot, who was also a contractor: *Hanson* v. *Hiles*, 34 Iowa, 350; see *Cook* v. *Parham*, 24 Ala. 21; *Dudman* v. *Dublin Board*. Ir. L. R. (7 Com. Law) 518; a miner who mines coal for a certain price per ton: *Penna. Coal Co.* v. *Costello*, 33 Pa. St. 241 (*Post* Wages); *Reed's Appeal*, 18 Pa. St. 235. All who work with their own hands: *Seider's Appeal*, 46 Pa. St. 57; *Ingram* v. *Barnes*, 7 El. & Bl. 115; *Jacobs* v. *Knapp*, 50 N. H. 71; *Floyd* v. *Weaver*, 16 Jur. 289; *Cochran* v.

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ability of the corporation at previous periods, founded upon a mere failure to meet its agreements, or upon the actual state of its finances after its business has been suspended."

The insolvency which gives rise to this lien is that which is judicially ascertained and becomes the ground of the court's jurisdiction. The court has nothing to do with the previous condition of the corporation. The lien given by the statute comes into existence as of the date which the court adjudges to be the time when the insolvency accrued, which gives it jurisdiction. That date in this case, fixed by the decree of the court, is September 6, 1878, and that must be taken as the time when the right of lien arose.

The second question propounded is, does this lien arise in favor of an assignee of a claim for wages, who acquired his right prior to the date of insolvency fixed by the decree? The wages, to be within the protection of the statute, must be due to a person in the employ of the corporation at the time when it becomes insolvent. If, prior to that time, they are assigned, so that when insolvency occurs they are not due to an employe, no lien arises. Such, I think, is the plain direction of the statute. Its words are: "In case of the insolvency of any corporation, the laborers in the employ thereof shall have a lien upon the assets thereof, etc." Only those in the employ of the corporation at the time of its insolvency are within

Swan, 53 Ga. 39; *Robbins* v. *Rice*, 18 N. H. 507; the digger of a well at a certain price per foot: *Louther* v. *Radnor*, 8 East, 113; house painters: *Martine* v. *Nelson*, 51 Ill. 422; a reporter and city editor of a newspaper: *Herries* v. *Norrell*, 17 Am. Law Reg. (N. S.) 97 and note; a drayman: *Watson* v. *Watson Co.*, 3 Stew. Eq. 588.

Employes or laborers of a sub-contractor may be included: *Branin* v. *Conn. R. R.*, 31 Vt. 214; *Mundt* v. *Sheboygan R. R.*, 31 Wis. 451; *Peters* v. *St. Louis R. R.*, 24 Mo. 586; *Kent* v. *New York Central R. R.*, 12 N. Y. 628; *Grannahan* v. *St. Louis R. R.*, 30 Mo. 546; *Cosgrove* v. *Tebo R. R.*, 54 Mo. 495; *Hart* v. *Boston R. R.*, 121 Mass. 510; *Conant* v. *Van Shaick*, 24 Barb. 87; *Winslow* v. *Urquhart*, 29 Wis. 360; *Redmond* v. *Galena R. R.*, Id. 426.

But see *Arbuckle* v. *Illinois R. R.*, 81 Ill. 429; *Cairo R. R.* v. *Watson*, 85 Ill. 531; *Gallaghar* v. *Ashby*, 26 Barb. 143; *Millered* v. *Lake Ontario R. R.*, 9 How. Pr. 228; *Lake Erie R. R.* v. *Eckler*, 13 Ind. 67; *Indianapolis R. R.* v. *O'Reily*, 38 Ind. 140; *Marks* v. *Indianapolis R. R.*, Id. 440; *Utter* v. *Crane*, 37 Iowa, 631; *Doe* v. *Monson*, 33 Me. 430; *Jacobs* v. *Knapp*, 50 N. H. 71; *Guthrie* v. *Horner*, 12 Pa. St. 236.

(3.) EMPLOYES: Counsel who have rendered professional services:

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either the words or the policy of the statute. The purpose of the statute is obvious. It is sometimes a matter of the utmost importance to the public that the business of an insolvent corporation should be kept in operation, and it is almost always true that the property of such bodies can not be preserved unless they are kept up as going concerns. The statute was designed to accomplish both of these purposes. And to this end it was clearly necessary that the employes of a corporation in an insolvent condition, whose skill and labor are indispensable to the continuance of its operations, should be made secure for their wages. To enable an insolvent corporation to retain its employes is the primary object of the statute. Persons holding claims for wages, who are not in the employ of a corporation at the time when it becomes insolvent, are not, therefore, within its policy nor entitled to its protection.

It is undoubtedly true that the assignment of the debt carries with it any security which the assignor holds. But when these assignments were made the assignors had no security or lien. The right of lien arose subsequently, and though the assignors may still have been in the employ of the corporation when it became insolvent, the wages previously assigned were not due to them, but to persons not entitled to the character of employes. The statute creates a lien in favor of no person except an employe who is in the employ of a corporation at

Gurney v. *Atlantic and G. W. R. R.*, 58 N. Y. 358; police officers: *Mallory* v. *United States*, 3 Ct. of Cl. 257; see *Kimball* v. *Boston*, 1 Allen, 417; a laborer on government grounds: *Stone's Case*, 3 Ct. of Cl. 260; not one who merely shovels and loads dirt on a gravel train: *Deppe* v. *Chicago R. R.*, 36 Iowa, 52; a secretary: *Wells* v. *South Minn. R. R.*, 1 Fed. Rep. 270.

(4.) MECHANICS: A vendor of machinery is not a machinist: *Kirkpatrick* v. *Bank of Augusta*, 30 Ga. 465; *Schofield* v. *Stout*, 59 Ga. 537; a corporation may be: *Loudon* v. *Coleman*, 59 Ga. 652; Phillips on Mech. Lien, § 53; *Yellow River Co.* v *Arnold*, 46 Wis. 214; see *Kentucky Lead Co.* v. *New Albany Water Works*, 62 Ind. 63; not one who works casually at a trade: *Grantham's Case*, 1 Winst. 73.

(5.) ARTIFICERS: A weaver of gloves at an agreed price per dozen pairs: *Chawner* v. *Cummings*, 8 Q. B. 311; *Moorhouse* v. *Lee*, 4 F. & F. 354; a "butty collier:" *Bowers* v. *Lovekin*, 6 El. & Bl. 584; *Sleeman* v. *Barrett*, 2 H. & C. 934; *Pillar* v. *Llynor Co.*, L. R., 4 C. P. 752; a vessel iron plater: *Lawrence* v. *Todd*, 14 C. B. (N. S.) 554; one working manually and also superintending others, for weekly wages and a commission: *Whiteley* v. *Armitage*, 13 W. R. 144; an overseer in a printing office: *Bishop* v. *Letts*, 1 F. & F. 401.

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the time when it becomes insolvent, and in favor of no debt except for wages due an employe who is in the employ of a corporation at the time when it becomes insolvent.

An assignment made after the lien has attached passes, of course, both wages and lien, and in such case the assignee will hold the debt with its security.

The third question submitted asks whether, if a claim is presented embracing other items than charges for wages, a lien for any part of it will attach. The statute gives no specific direction as to the method in which claims under this section shall be proved. Unsecured debts are to be proved in such manner as this court shall direct: Rev. 188, § 62. Generally, the books of a corporation contain the only written evidence of the amount of wages due to its employes. When this is the case, no difficulty can arise in ascertaining the sums for which liens may be claimed. To prevent confusion in case an employe happens to have two claims, one entitled to preference and the other not, they should be proved separately, but if he fails or refuses to do so, I know of no principle of law which would justify the court in declaring that he had thereby forfeited his right under the statute. If, in consequence of the intermingling of charges for wages with charges not lienable, serious difficulty should arise in ascertaining how much is due for wages, I think all fair doubts should be re-

(6.) OPERATIVES: An apprentice: *ex parte Steiner*, 1 Pa. L. J. Rep. 368; *Bedford* v. *Newark Machine Co.*, 1 C. E. Gr. 117; see *The Beaver*, 3 Rob. Ad. 292; *Mason* v. *The Blaireau*, 2 Cranch, 240; *Milligan* v. *Wedge*, 12 A. & E. 737; *New Orleans R. R.* v. *Harrison*, 48 Miss. 112; or son of a workman: *in re Hartman*, 4 Bank. Reg. 103; *Atcherson* v. *Troy R. R.*, 6 Abb. Pr. (N. S.) 338; see *Barron* v. *Collins*, 49 Ga. 580; or wife: *Thayer* v. *Mann*, 2 Cush. 371; see *Angulo* v. *Sunol*, 14 Cal. 402.

The following were held to come within none of the classes named; a statute giving redress to "any person" injured on a railroad, does not include a laborer: *Rohback* v. *Pac. R. R.*, 43 Mo. 187; a statute exempting the wages of railroad employes from garnishment was afterward extended to all employes who were married: *Held*, that railroad employes were embraced in the amendment: *Burlander* v. *Milwaukee R. R.*, 26 Wis. 76; see *Johnston's Estate*, 33 Pa. St. 511; contractors: *Sharman* v. *Sanders*, 13 C. B. 166; *Ingram* v. *Barnes*, 7 El. & Bl. 115; *Riley* v. *Warden*, 2 Exch. 59; *Lehigh Coal Co.* v. *Central R. R. Co.*, 2 Stew. Eq. 252; *Ney* v. *Dubuque R. R.*, 20 Iowa, 347; *Boutwell* v. *Townsend*, 37 Barb. 205; *Cummings* v. *New York R. R.*, 1 Lans. 68; *Chapman* v. *Black River R. R.*, 4 Lans. 96; *Corbin* v. *Amer. Mills*, 27 Conn. 274; *Balch* v. *N. Y. & O. R. R.*, 46

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solved against the claimant's right to preference, and he should only be allowed a lien for such sum as clearly appears to be due for wages.

The fourth question discussed is, does the statute give a lien for wages earned prior to April 7, 1875? That is the date of the incorporation of the provision under consideration into the general corporation act. Prior to that date it applied to such corporations only as were organized under the act authorizing the establishment of manufacturing corporations. The Oxford Iron Company was created by special charter: P. L. of 1859, p. 377.

Statutes are to be construed to operate prospectively, unless a retrospective effect be clearly intended. As a general rule, a statute takes effect only from its date, and therefore, although its words may be broad enough in their literal signification, to comprehend existing cases, it is to be construed as extending only to cases that shall arise after its date. Even remedial statutes are to be deemed prospective, and are not to be applied to existing proceedings unless a contrary intent be clearly expressed. These are familiar rules of construction.

There is nothing on the face of this statute, and certainly nothing in its policy, which indicates that the legislature intended it should have a retrospective effect. The lien given by it, as against this corporation, attaches only to wages earned since April 7, 1875.

N. Y. 521; *Aiken* v. *Wasson*, 24 N. Y. 482; *Breed* v. *Nagle*, 46 Ga. 112; *Witman* v. *Walker*, 9 W. & S. 183; *Footman* v. *Pusey*, 45 Ga. 561; *Robinson* v. *Webb*, 11 Bush. 474; *Chicago R. R.* v. *McCarthy*, 20 Ill. 385; a physician: *Weymouth* v. *Sanborn*, 43 N. H. 171; see *Hunter's Case*, 1 Winst. 372; a foreign superintendent of mines: *Hill* v. *Spencer*, 1 M. R. 414; *Dean* v. *DeWolf*, 16 Hun, 186; a time-keeper of laborers: *M. K. & T. R. R.* v. *Baker*, 14 Kan. 562; *Snyder v. Gibbons*, 3 Phila. 126; or paymaster: *Edgar* v. *Salisbury*, 17 Mo. 271; a consulting engineer: *Ericsson* v. *Brown*, 38 Barb. 390; a secretary: *Coffin* v. *Reynolds*, 37 N. Y. 640; see *Richardson* v. *Abendroth*, 43 Barb. 162; an architect: *Bank of Pa.* v. *Gries*, 35 Pa. St. 423; *Ames* v. *Dyer*, 41 Me. 397; *Price* v. *Kirk*, 90 Pa. St. 47; *Raeder* v. *Bensberg*, 6 Mo. App. 445; *aliter*, where he also superintends the building: *Mut. Ben. Ins. Co.* v. *Rowand*, 11 C. E. Gr. 389; *Knight* v. *Norris*, 13 Minn. 473; *St. Clair Coal Co.* v. *Martz*, 75 Pa. St. 384; *Stryker* v. *Cassidy*, 76 N. Y. 50; see *Foushee* v. *Grigsby*, 12 Bush. 75; the superintendent of a building who is also the contractor: *Blakey* v. *Blakey*, 27 Mo. 39; see *Kansas R. R.* v. *Little*, 19 Kan. 267; the foreman of a tailor: *Lauran* v. *Hotz*, 1 Mart. (N. S.) 140; a teacher in an insolvent's

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Some of the employes of the Oxford Iron Company have permitted their wages to remain uncollected for long periods, extending, in some instances, over three or four years. Whether they did so at the request of the officers of the corporation, or because they believed them to be safe and desired them to accumulate, does not appear. The question raised on this branch of the case is, are such parts of the claim as embrace wages earned prior to the pay day immediately preceding the date when the corporation became insolvent entitled to the preference given by the statute? It is insisted that the statute was not intended to give protection to the negligent and slothful, nor to enable employes to use a trading or manufacturing corporation as a savings bank. Its pertinent words are that the employes in the employ of any corporation at the time when it becomes insolvent, shall have a lien, "for the amount of wages due to them respectively." This language is plain and easily understood. The inquiry is very simple: Is the sum claimed wages? If the wages have been paid, and then returned as a deposit or loan, the sum due is not wages—they have been paid—but a loan. But if no payment has been made, but the sum due still represents compensation for labor or service, then the case is just the one described by the statute, and is clearly within its words as well as its spirit. There are no restrictive words in this

school: *Labato's Case*, 2 Mart. (N. S.) 652; see *Dollahite's Case*, 1 Winst. 74; a music master: *ex parte Walter*, L. R. (15 Eq.) 412; a governess: *Todd* v. *Kerrick*, 8 Exch. 151; workmen in an iron foundry as servants: *Meason's Case*, 5 Binn. 167; *ex parte Crawfoot*, 1 Mont. 270; an undertaker: *Jones* v. *Shawhan*, 4 W. & S. 257; the guard of a stage coach: *ex parte Skinner*, 3 Deac. & Chit. 332; workmen who work by the piece: *ex parte Grellier*, 1 Mont. 264; a surveyor of wood: *Blackman's Case*, 6 Chicago L. N. 18; "croppers:" *Daniel* v. *Swearengen*, 6 Rich. (N. S.) 471; one who had agreed to build a wall at a certain price and within a certain time: *Lancaster* v. *Greares*, 9 B. & C. 628; *McGinness* v. *Parrington*, 43 Conn. 143; an overseer: *Rust* v. *Billingslea*, 44 Ga. 308; *Whitaker* v. *Smith*, 81 N. C. 340; see *Caraker* v. *Mathews*, 25 Ga. 571; one engaged in selling and delivering wood by the cord at a mill: *Wadsworth* v. *Duke*, 50 Ga. 91; see *Palmer* v. *Tucker*, 45 Me. 316; a plasterer: *Fox* v. *Rucker*, 30 Ga. 525; *Parker* v. *Bell*, 7 Gray, 429; a mover of buildings: *Stephens* v. *Holmes*, 64 Ill. 336; an agent of an insurance company, in another State: *First Nat. Bank* v. *Jaggers*, 31 Md. 38; a policeman: *Johnson* v. *Mallet*, 2 Winst. 13; see *Buttrick* v. *Lowell*, 1 Allen, 172: *Kimball* v. *Boston*, Id. 417.

Servants, etc., who voluntarily leave, forfeit their lien for wages due: *ex*

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statute, either as to time or amount. The statute regulating assignments for the benefit of creditors limits the sum for which preference may be claimed: Rev. 38, § 8. The presence of this limitation in one act, and not in the other, shows very clearly, I think, that the legislature intended to prescribe a different rule in one case from that which was prescribed in the other. This purpose must have effect.

The sixth question is, does the acceptance of a promissory note operate as a waiver of the lien? This lien, like any other right, may be waived. An intention to extinguish a right may, in certain cases, be as unmistakably manifested by acts as by words, but to warrant the court in giving acts such force, they must declare the actor's purpose with such clearness and certainty as to be, in effect, a declaration of his intention to give up his rights. The acceptance of a promissory note, without security, is not capable of being so understood; all the inferences to be drawn from such an act run very strongly in the opposite direction. The rule upon this subject, I think, is settled. The acceptance of the debtor's own promissory note for a debt, which may be made the basis of a lien under the Mechanics' Lien Law, is not a waiver of the payee's right of lien. The same rule, I think, should govern here.

The seventh question may be stated as follows: Does this

parte Gee, 3 Deac. 563; *ex parte Bennett*, 3 Mont. & Ayr. 669; *Napier's Case*, 2 Pug. 300; 3 Pug. 134; *Bedford* v. *Newark Machine Co.*, 1 C. E. Gr. 117; see *Curtis' Case*, 1 Winst. 180; *Sander's Case*, 2 Mont. & Ayr. 684.

Taking a note for the wages is no waiver: *Weymouth* v. *Sanborn*, 43 N. H. 171; *Clement* v. *Newton*, 78 Ill. 427; *Lariolete* v. *Redding*, 4 B. Mon. 81; *Goble* v. *Gale*, 7 Blackf. 218; *Meeks* v. *Sims*, 84 Ill. 422; *McMurray* v. *Taylor*, 30 Mo. 263; *Morrison* v. *Laura*, 40 Mo. 260; *Blake* v. *Pitcher*, 50 Md. 453; *Prentiss* v. *Garland*, 67 Me. 345; *Hutchinson* v. *Swartsweller*, 4 Stew. Eq. 205; *White* v. *Dumpke*, 45 Wis. 454; see *Hutchins* v. *Olcott*, 4 Vt. 549; *Green* v. *Fox*, 7 Allen, 85; *Ehlers* v. *Elden*, 51 Miss. 495; *Schneider* v. *Kolchoff*, 59 Ind. 568; *Napier's Case*, 2 Pug. 300.

A laborer's lien is not assignable: *Cairo & V. R. R.* v. *Fackney*, 78 Ill. 116; *Wing* v. *Griffin*, 1. E. D. Smith, 162; *Ruggles* v. *Walker*, 34 Vt. 468; *Rollin* v. *Cross*, 45 N. Y. 766; *Dano* v. *M & O. R. R.*, 27 Ark. 564; *Tewksbury* v. *Bronson*, 48 Wis. 581; see *Krauser* v. *Ruckel*, 17 Hun, 463; *Rogers* v. *Omaha Co.*, 4 Neb. 54; *Goff* v. *Papin*, 34 Mo. 177; *Brown's Case*, 4 Ben. 142; *Nash* v. *Mosher*, 19 Wend. 431; *Sinton* v. *Roberts*, 46 Ind. 476; *Farwell* v. *Grier*, 38 Iowa, 83; *Bonnell* v. *Holt*, 89 Ill. 71; *Kerr* v. *Moore*, 54 Miss. 286; *Peters* v. *St. Louis R. R.*, 24 Mo. 586; also Phillips on Mech. Lien, Ch. VI. Rep.

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lien include interest? The question, it will be observed, assumes that interest has accrued. What the fact is I have no means of ascertaining, but for the purpose of deciding the question I shall assume that interest has accrued. Interest is not within the literal terms used — wages alone are mentioned. The employes are to have a lien "for the amount of wages due to them respectively." Ordinarily, where a debt bears interest, the interest is regarded as an incident of the debt, constituting part of it, and if a lien is given for the debt it covers the whole debt, including interest. But the word used here is not "debt," but "wages,"—viz., compensation for labor or services. Another part of the section, however, shows that wages was used as synonymous with debt; for the direction is, that wages shall be paid prior to other debt or debts. The important considerations on this branch of the case are: Wages are usually paid at short intervals. Such is almost universal custom. It grows out of the necessities of the employes. They generally work for small compensation, and their daily labor is their only means of support. They are seldom able to allow their wages to accumulate. Protection for accumulation was, obviously, not one of the purposes of the law. Such cases so rarely happen that it can not be supposed that the legislature intended to make provision for them. The legislature merely intended to secure to employes their wages, for that was all the protection it was necessary to extend to them to accomplish the end in view, namely, to keep an insolvent corporation in operation as a going concern. In the great majority of cases, the amount of wages that an employe will allow to fall in arrear will be very small, and the sum due for interest will be still smaller—so trifling indeed, that it would have no influence whatever upon his judgment in deciding whether he should stay or seek other employment. Besides, the preference given is in derogation of the common right of equality among creditors of the same rank, and the scope of the statute should not, therefore, be extended by construction. The court is bound to give what is granted, but nothing more. The lien given is for wages, and I think the court is bound to restrict it to wages. No interest should be allowed before the lien attaches; after that, interest should be allowed.

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The counsel of the receiver charges that some of the claims have been proved for sums in excess of the amounts really due. Such claims, he insists, are fraudulent; and for that reason it is the duty of the court to declare the right of lien, in respect to them, to be forfeited. There is no evidence of fraud before the court. But suppose there was, the statute does not make fraud a cause of forfeiture. It contains no words of forfeiture for any cause. Such a purpose must not be imputed to the law making power in the absence of clear words, or an implication so strong as to be equivalent to express words: *Reeve* v. *Elmendorf*, 9 Vr. 125, has no application to the matter in hand. There is no analogy in any point of view between the two cases. Usually the officers of a corporation are much better informed as to the amounts due to its creditors of this class than are the creditors themselves. Their books frequently contain the only account existing between the parties, and in case of dispute are resorted to by both parties as their mutual arbiter. It is not pretended in this case that the least difficulty will be encountered in ascertaining the actual amounts due.

In my judgment the mere fact that a claim for wages is presented for a sum in excess of the amount really due, does not deprive the claimant of the preference given to him by the statute.

1. Vendors' lien, claimed on contracts, payable out of mine proceeds: *Toombs* v. *Cons. Co.*, 3 M. R. 210.

2. Vendors' lien on coal allowed to the vendor (or lessor): *Manning* v. *Frazier*, 8 M. R. 307.

3. Liens at law and liens in equity distinguished: *Davis* v. *Flagstaff Co.*, 2 M. R. 660.

4. Miner's lien has no preference as against liens of record: *In re Johnston's Estate*, 33 Pa. St. 511; *Lunt* v. *Stephens*, 75 Ill. 507; *Williams* v. *Santa Clara Co.*, 5 Pac. Rep. 85.

5. Miners' wages defined: *Pennsylvania Co* v. *Costello*, 23 Pa. St. 241. *Post* Wages.

6. Priority of lien on stone quarried after foreclosure, as between the mortgagee and the quarrymen: *American Co.* v. *North Belleville Co.*, 31 N. J. Eq. 89. *Post* Mortgage; *Collins Granite Co.* v. *Devereux*, 72 Me. 422.

7. A brick maker has no lien on brick manufactured for his employer on the land of a third party: *King* v. *Indian Orchard Co.*, 11 Cush. 231.

8. Lien lost by long period of suspension of labor before completing contract: *Lunt* v. *Stephens*, 75 Ill. 507.

9. Lien against leasehold interests and fixtures: *Dobschuetz* v. *Holliday*,

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6 M. R. 108; *Esterley's App.*, 54 Pa. St. 192; *Parrish's App.*, 83 Pa. St. 111; *Hathaway* v. *Davis*, 5 Pac. Rep. 29.

10. Mining partners have a lien on their copartners' interest for balance against such interest: *Duryea* v. *Burt*, 28 Cal. 569. *Post* PARTNER.

11. A ditch is not a "superstructure" under the lien act: *Ellison* v. *Jackson Co.*, 4 M. R. 559.

12. Lien claimant must comply with substantial requirements of the act; omission to name owner in terms, is fatal: *Malter* v. *Falcon Co.*, 1 West, C. R. 514.

13. Landing cargo is not necessarily a delivery so as to discharge the freighter's lien: *600 Tons of Iron Ore*, 9 Fed. 595.

14. Lessor's interest held for work done for lessee: *Gould* v. *Wise*, 2 West, C. R. 405.

15. A mine may be considered a "structure" under the Mechanics' Lien Law: *Helm* v. *Chapman*, 5 Pac. Rep. 352.

16. Waiver of lien, when implied from course of dealing: *Iron Co.* v. *Murray*, 38 Ohio St. 323.

17. Lien maintained against fixtures, on leasehold interest: *Hart* v. *Globe Iron Works*, 37 Ohio St. 75.

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GLEESON, Administratrix, etc., v. MARTIN WHITE MINING CO.

(13 Nevada, 442. Supreme Court, 1878.)

First discoverer neglecting to locate. Where a lode has been discovered, and a location attempted by the discoverer, and the same vein is afterward entered upon by others and an adverse location attempted, such later parties if they comply with the law, and the discoverers have failed to comply, have an exclusive right, no matter who is entitled to the credit of discovery.

[1] **Boundaries must be marked.** It is an imperative requirement of the law, and indispensable to a valid location, that it shall be "distinctly marked on the ground, so that its boundaries can be readily traced."

Setting stakes at the four corners is a sufficient marking.

[2] **Relation of vein to location.** It is true that the vein is the principal thing and the surface only an incident thereto, but the location is of *a piece of land* including the vein.

[3] **Reasonable time to trace vein.** The locator has a reasonable time to trace his vein before he is bound to perfect his location by fixing his bounds on the surface, but the location is never complete till this is done.

Change in system of location. The custom long prevailed on the Pacific slope to locate a single vein by means of a notice posted on the croppings without any definition of boundaries, and to follow the vein wherever it ran to the extent of the feet claimed; the act of May 10, 1872, has changed all that. The location now is of *a piece of land* with all the veins it may contain.

Staking the discovery and center line, sufficient. The discoverers of the Paymaster lode placed a monument and notice at the point of discovery, and placed a stake at each end of the claim on the center line marked with the name of the lode, and so as to show on each stake which end of the claim it purported to mark, and these stakes were on the line of the croppings: *Held*, a sufficient marking of the boundaries under the act of May 10, 1872.

Immateriality of the location notice, except during the period pending the completion of the staking and record, considered.

The district rules must be complied with as well as the mining acts of Congress, when the former are not in conflict with the latter.

The location notice need not contain a description of the claim by reference to natural objects or permanent monuments; that is required only in the record.

Changing names of locators on the record. Where one of the locators'

[1] *Funk* v. *Sterrett*, 59 Cal. 613; *Sweet* v. *Webber*, 7 Colo. 443; *Strepey* v. *Stark*, Id. 614; *Gelcich* v. *Moriarty*, 9 M. R. 498; *Jupiter Co.* v. *Bodie Co.*, 4 M. R. 412; *Eilers* v. *Boatman*, 1 West C. R. 632.

[2] *Wolfley* v. *Lebanon Co.*, 4 Colo. 112; *Post* SIDE LINES.

[3] *Erhardt* v. *Boaro*, 4 M. R. 434.

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names had been erased from the recorded notice (location certificate), and the name of another party substituted: *Held*, that notwithstanding such change the record was valid as to outsiders.

Changing courses on the record. Besides the change of names, the location certificate as recorded in the district record contained for the course of the lode the words "westerly" and "easterly." These were changed to "northerly" and "southerly," but without any fraudulent intent: *Held*, that the changes were immaterial, were no proof of abandonment of the original location, and that the facts of the case did not present any question of estoppel.

Appeal from the District Court of the Sixth Judicial District White Pine County.

THOS. WREN, H. K. MITCHELL, CRITTENDEN THORNTON and GARBER & THORNTON, (HARRY I. THORNTON), for appellant.

A. M. HILLHOUSE and R. P. & H. N. CLEMENT, for respondent.

By the Court, BEATTY, J.

This is an action to determine the right of possession of certain mining ground in the Ward district, White Pine county. The plaintiff deraigns title from the locators of a claim called the Shark, and the defendant is the grantee of the locators of the Paymaster. Both claims were located on the same ledge — the Paymaster in July, the Shark in September — and the principal question in the case is as to the validity of the Paymaster location. The facts in regard to this location are very clearly and fully presented by the findings of the district judge, which embrace the special verdict of a jury upon a number of issues submitted to its decision. No exception whatever is taken by either party to the findings of the jury, and the objections of the appellant to the additional findings of the court relate rather to the conclusions of law involved than to the facts upon which they are based. The question before us is therefore narrowed down to a construction of the legislation of Congress and the local rules of the Ward district governing the location of mining claims.

Before entering upon a discussion of the purely legal questions involved in the case, however, it will be best to give a connected statement of the facts, which are as follows: Mineral deposits were first discovered in what is now the Ward mining

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district, by Thomas F. Ward, in March, 1872. On the first of May the district was organized, a set of local rules adopted, and (it seems) Ward appointed recorder. The rules so first adopted were, in their general features, like the rules everywhere prevalent on this coast before the enactment of the law of Congress of May 10, 1872. Claims were to be located by posting a notice at the point of discovery; the notice to be recorded in fifteen days; this to hold the claim good for one hundred days, within which time a certain amount of work was to be done on the ground, in order to hold the claim a year. Each locator was to have fifty feet of the surface on each side of his ledge or vein, but this not to carry the right to any mineral deposit therein distinct from the one located. These rules, so far as they were not inconsistent with the act of Congress of May 10, 1872, continued in force until the first of October following, when the miners adopted a new set of rules.

Such being the law of the district for the location and holding of claims, Ward, on the seventeenth of July, 1872, discovered the vein or ledge which is now in controversy, and placed upon the croppings at the discovery point the following notice:

"Paymaster location notice.—We, the undersigned, do hereby locate and claim fifteen hundred (1,500) feet on this ledge, lode, or deposit of mineral-bearing quartz or rock, with all its dips, spurs, angles and variations, together with all privileges prescribed by the mining laws of the United States and this district, and intend to hold and work the same according. We claim three hundred (300) feet easterly, and twelve hundred (1200) feet westerly from this monument, running along the course of the vein. This shall be known as the Paymaster. Ward mining district, July 17, 1872, situated about fifteen hundred feet N. W. by N., from Mountain Pride lode."

To this notice were appended the names of the locators, and opposite the name of each was set the number of feet (undivided) to which he was to be entitled.

On the following day, July 18th, the claim was recorded by Ward, as mining recorder of the district, by copying it into a small memorandum book which he carried in his pocket, and which at that time constituted the record book of the district. Subsequently, about the first of August, a larger book was ob-

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tained, and the records transcribed from the little book. In the meantime, however, the Paymaster notice, and the record of it, had been changed as follows: It seems that there was some sort of an agreement subsisting between Ward, John Henry, E. C. Hardy and three others, that they should be equally interested in the locations made by Ward. But in the location of the Paymaster, Ward had omitted Hardy's name, and inserted that of Dave Pearson, who was not a member of the company. A few days after the location and recording of the claim, Henry called Ward's attention to the fact that Pearson's name was improperly on the notice, and Hardy's name improperly omitted. He also objected to the unequal distribution of the claim among the six locators. Ward thereupon changed the notice on the ground, and the record in the little book, by erasing the name of Pearson and substituting the name of Hardy, and by changing the figures following the names, so as to give to each locator two hundred and fifty feet of the claim. These changes in the notice and in the little book were made before the transcription to the large book, which, since the first of August, 1872, has contained the records of the Ward district.

Subsequent developments have shown that the vein or ledge upon which this Paymaster claim was located has a course or strike from southeast to northwest. According to the magnetic meridian (variation 16½°) it runs more nearly east and west.

In September, 1872, some work, it does not appear how much, had been done on the Paymaster location, but the course of the vein was not clearly determined.

Such being the condition of that claim, on the ninth of September the locators of the Shark discovered the croppings of the same vein at a point about four hundred feet northwest of the location point of the Paymaster, and posted the following notice:

"Shark mine No. 1. Notice. We, the undersigned, do hereby locate and claim fifteen hundred (1500) feet on this ledge, lode or deposit of mineral-bearing quartz and rock, with all its dips, spurs, angles and variations, together with all privileges prescribed by the mining laws of the United States and this district, and intend to hold and work the same accordingly. We claim seven hundred and fifty feet on each side of the

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monument running along the course of the vein. This shall be known as the Shark mine No. 1.

"Ward Mining District, Nye County, Nevada, September 9, 1872.

"JOHN TAYLOR, three hundred and seventy-five feet.

"THOMAS CONNOR, three hundaed and seventy-five feet.

"MATHEW GLEESON, three hundred and seventy-five feet.

"CHAS. STRUTENBERGER, three hundred and seventy-five feet."

On the following day this notice was recorded, the certificate to the record being as follows:

"Recorded September 10, 1872, at ten o'clock A. M. Situated about six hundred feet northeasterly from Young American mine, and about three hundred feet northwesterly from Paymaster mine.

"THOMAS F. WARD, Recorder."

Some significance is attributed to the fact that Ward, the locator of the Paymaster, going upon the ground for the purpose of making this record, and necessarily observing the proximity of the Shark to the Paymaster, made no complaint at the time that the Shark locators were on his claim. It was not until October, and after some work had been done by the locators of the Shark, that notice was given that they were on the Paymaster vein. They, however, denied that it was the same vein. They claimed a cross-vein, and declared that if it turned out that they were on the Paymaster they would give it up.

About this time, on October 10, 1872, John Henry, one of the Paymaster locators, took down their notice and put up another, the same in all respects as the one removed except that it claimed three hundred feet southerly and one thousand two hundred feet northerly from the monument, instead of three hundred feet easterly and one thousand two hundred feet westerly. On the same day he drove down two stakes, one at the northwest end of the Paymaster and the other at the southeast end. They were marked, "northwesterly stake of Paymaster" and "southeasterly stake of Paymaster." These stakes were on a line, or very nearly on a line, with the croppings of the vein as now developed, and within a few feet of the center line of the claim as now surveyed. At some

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time subsequent to the change of the notice on the mine, a corresponding change was made in the record of the claim by erasing the words easterly and westerly, and inserting the words southerly and northerly. The jury could not find who made this change in the record, but the district judge was of the opinion, and so are we, that it was done by Ward and Henry, but without any fraudulent intent.

In the meantime, on the first of October, the laws of the district had been changed so as to conform more nearly to the act of Congress of May 10, 1872, it being especially provided that locators should have three hundred feet of surface ground on each side of their vein, to include, of course, not only the vein originally located, but all veins within the surface lines: R. S., Sec. 2322.

It is found as a fact that sufficient work has been done under each of these locations to satisfy the requirements of the law of Congress and the rules of the district. The Paymaster location was never marked upon the ground in any other way than by the three stakes on the line of the croppings, one at each end and one at the point of discovery, until it was surveyed for the purpose of the patent application in October, 1875. The Shark location was never marked on the ground in any way, except by the monument at its initial point, until April, 1874, when Gleeson set stakes at the four corners of the surface claim. On these facts the district judge concluded that the Paymaster location was valid, and, as a necessary consequence, the subsequent location of the Shark on the same ground was invalid. In accordance with this conclusion the judgment of the district court was for the defendant.

The plaintiff, appealing from the judgment and from the order denying her motion for a new trial, makes a number of assignments of error, which, however, are all involved in the three propositions following.

It is contended: 1. That the Paymaster claim was not located in conformity with the act of Congress and the rules of the district, and consequently that it was void. 2. That the Paymaster locators, if they ever had a good claim, abandoned it. 3. That they are estopped by their own acts from asserting any claim adverse to the Shark.

Keeping these propositions entirely distinct, and confining our attention for the present to the first, it is to be observed

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that there is no question that the locators of the Paymaster were the original discoverers of the ledge in controversy; that they made a *bona fide* attempt to locate it; that their claim was notorious; that they and their successors have continued to occupy and develop the property; that the Shark locators were aware of the priority of the Paymaster claim, and originally repudiated any intention of locating upon the same vein. These facts being conceded, the only position open to the appellant, and the only position her counsel have attempted to maintain, is that a mining claim can not be held except by compliance with certain requirements of the mining laws; that the Paymaster locators did not conform to those requirements, while the locators of the Shark did, and that, as a necessary consequence, the law gives her the property. Aside from the questions of abandonment and estoppel, she claims nothing except from a strict application of the law, regardless of any seeming hardship in depriving the defendant of a mine which its predecessors were the first to discover, claim and develop.

There can be no doubt as to the correctness of the proposition upon which this claim is founded. The United States have granted to their citizens, and to those who have declared their intention to become such, the right to explore and occupy the public mineral lands: U. S. Rev. Stat., Sec. 2319. Those qualified locators, who comply with the laws of the United States and the local regulations, not in conflict therewith, governing their possessory title, have the *exclusive* right of possession and enjoyment of their locations: R. S., 2322. He who complies with the law has the *exclusive* right. Therefore, if it is true that the Shark locators complied and those of the Paymaster did not, the plaintiff must take the mine, no matter who is entitled to the credit of the discovery.

What then constitutes compliance? The questions involved in this branch of the case have led to a very thorough and elaborate discussion of the mining laws of the United States, and particularly of the act of Congress of May 10, 1872 (R. S., Sec. 2319 *et seq.*), under which these claims were located, and which embodies the most important features of the mining legislation. The same questions were, to some extent, involved in the case of the *Golden Fleece Co.* v. *Cable Consolidated Co.*, 12 Nev. 312, but were not very fully argued, and were discussed in the opinion only so far as seemed to be

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necessary for the disposition of that case. Some of the conclusions then announced have been questioned by counsel for respondent in this appeal, but after a thorough re-examination of the whole subject, with all the light that has been thrown upon it by the most elaborate argument, oral and written, we remain entirely satisfied with that opinion. So far as it goes it is a correct exposition of our present understanding of the law. But it does not cover the whole ground, and is, perhaps, not sufficiently explicit upon some of the points adverted to. The magnitude of this case and the great importance of the subject to a mining community warrant a re-statement of our views in a more complete and, we hope, a more convincing form.

One of the imperative requirements of the statute, an indispensable condition precedent of a valid location, is, that it shall be "distinctly marked on the ground so that its boundaries can be readily traced." R. S., 2324. By reference to the foregoing statement of facts it will be seen that one of the locators of the Shark, in April, 1874, marked the boundaries of that location by setting stakes at the four corners of the claim. It is conceded that this was a sufficient marking of that location; but it is contended that the Paymaster had been sufficiently marked since October 10, 1872, by means of the two stakes at the ends of the claim on the line of the croppings, and by the location monument at the point of discovery. Whether this marking was sufficient to answer the requirements of the statute is the principal question in the case, and, as a step toward its solution, counsel have devoted a great portion of their argument to the preliminary question: What does a mining claim consist of? What are its essentials? What are its incidents? Is it the surface ground that is located, or is it the vein with the surface as an incident? It is conceived that a determination of this point will greatly facilitate the inquiry as to what sort of marking of boundaries is required. Counsel for appellant contend that the location is of the surface, and that stakes at the corners of the claim are essential. Counsel for respondent insist that the location is of the vein, as the principal thing, with the surface as a mere incident, and that stakes to define the limits of the claim upon the vein are sufficient.

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What we said in the *Golden Fleece Case* we think expresses the truth in regard to this matter: "It is true that the vein is the principal thing and that the surface is but an incident thereto; but it is also true that the mining law has provided no means of locating a vein except by defining a surface claim, including the croppings, or point at which the vein is exposed, and the part of the vein located is determined by reference to the lines of the surface claim." 12 Nev. 329.

The vein is the principal thing in the sense that it is for the sake of the vein that the location is made; the surface is of no value without it; no location can be made until a vein has been discovered within its limits, and the surface must, or at least ought to be, located in conformity with the course of the vein: R. S., 2320. But the location is of a piece of land including the vein.

"A mining claim located after the tenth day of May, 1872, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, 1872, render such limitation necessary. The end lines of each claim shall be parallel to each other." R. S., 2320. This section alone shows that it is a surface parallelogram not less than fifty feet in width that must be located. But the purpose of the law is more clearly indicated by its granting clauses. What is it that the locators have the exclusive right to possess? Having complied with the laws they "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations." R. S., 2322. This is the only part of

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the act which grants the right to possess any lode, ledge or vein. The vein originally discovered, and for the sake of which the location is made, is lumped in with other mineral deposits that may happen to exist within the limits of the surface claim, and no part of it is granted except that part the top or apex of which lies inside of the surface lines extended downward vertically. This, it would seem, ought to be conclusive, but the language of section 2325 is, if possible, still more convincing: "Section 2325. A patent for *any land* claimed and located for valuable deposits may be obtained in the following manner: Any person, association or corporation, authorized to locate a claim under this chapter, having claimed and located *a piece of land* for such purposes," may, by taking the prescribed steps, obtain the title upon payment of five dollars per acre for the land.

Thus it appears that a location on a vein must be made by taking up a "*a piece of land*" to include it. No other means are provided, and it is only upon condition of complying with the law that the locator becomes entitled to anything. The discoverer of a vein may be allowed a reasonable time to trace its course before being compelled to define his surface claim, and in the meantime may be protected in his claim to fifteen hundred feet of the vein, but his location will never be complete until his surface claim is defined. That this is the only possible construction of the statute seems so plain to our minds that we should have thought it superfluous to say a word in defense of our view if we were not aware that an opposite opinion is very largely prevalent. We think this is due to the fact that the custom of locating a vein claim by means of a notice posted on the croppings, and of holding it by record of the notice and work done at the discovery point, without any definition of boundaries, has prevailed so long and so universally on the Pacific coast that the system has come to be regarded by a great many as something essentially inherent in the nature of things. The right, under such locations, to follow the vein in whatever direction it might run, to the extent claimed in the location notice, taking the adjacent surface necessary for the convenient working of the mine as a mere incident thereto, has been so long recognized and enjoyed as to have almost assumed the character of one of the natural

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and inalienable rights of man. That the government, in disposing of its mineral lands, has adopted a radically different system, under which a vein can only be located by means of a surface claim, and held only to the extent that it is included within the surface lines, is a thing too incredible to be believed by those to whom the old customs seemed rooted in the very foundations of justice.

But disagreeable as the awakening may be, it is time we were opening our eyes to the fact that a new system has been introduced. The act of Congress of May 10, 1872, has effected the changes above indicated. Its language is plain and unambiguous, and whatever may be our opinion of the impolicy of the changes effected by it, we are bound to submit and conform ourselves to its requirements. If the terms of the statute left any room for construction the *argumentum ab inconvenienti* might be entitled to great weight, but it can not be invoked where the language of the law is so plain as it is in this instance.

Besides, we do not share in the opinion that the new system is so utterly bad. Nobody can pretend that it is perfect, but to our minds it is a great improvement on the system which it displaced. We are willing to admit that cases may arise to which it will be difficult to apply the law, but this only proves that such cases escaped the foresight of Congress, or that, although they foresaw the possibility of such cases occurring, they considered that possibility so remote as not to afford a reason for departing from the simplicity of the plan they chose to adopt. So far, the wisdom of the congressional plan has been sufficiently vindicated by experience. It is true that veins and ledges are not found to be perfectly regular in their formation—they have not a perfectly straight course even in depth, and near the surface they present still greater irregularities of strike and dip; but still they approximate the ideal vein that Congress seems to have had in view sufficiently nearly to admit of an easy application of the law in all the cases of conflicting claims that have fallen under our observation.

As to the difficulty of establishing surface lines immediately upon the discovery of a vein, that also is conceded. It is a well-known fact that the croppings of a vein are always a very

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imperfect, and often a very deceptive, guide to its course, and it will often be difficult, and sometimes impossible, to locate a surface claim in conformity with the course of the vein, even after years spent in its development.

But all this affords no argument against the system. Unless the miners voluntarily restrict themselves by local regulations, a claim may always be one thousand five hundred feet long by six hundred feet wide. Let the discoverer of a vein be ever so unfortunate in locating his claim, he can not possibly get less than six hundred feet of the vein, while under the old law the most he could get was four hundred feet. How, then, can it be said that he is subjected to any hardships? So far from restricting his rights, the new law has very greatly enlarged them, and at the same time has made them vastly more certain and secure.

Futhermore, we do not understand that the law requires the surface claim to be defined immediately upon the discovery of the vein. We think that under any circumstances the discoverer, if he went to work diligently to trace out its course, would be allowed a reasonable time for that purpose, and in the meantime would be protected in his right to one thousand five hundred feet of the vein. In the absence of any State or territorial or local regulation prescribing the time to be allowed for tracing, the question as to what should be deemed a reasonable time would have to be determined in view of the facts and circumstances of each case. We said, however, in the *Golden Fleece Case*, 12 Nev. 329, and we still think, that this is a matter for local regulation under the power delegated to the miners by section 2324 of the Revised Statutes, to make rules not in conflict with the laws. Any reasonable rule for the provisional holding of a claim, by means of the posting and recording of notice, during the time necessary for tracing, would, we feel confident, be favorably viewed by the courts, especially if it required the locator to use diligence in the work of tracing during the time allowed for that purpose. This, however, is a question which we are not called upon to decide in this case. We have been led into this line of argument in response to what has been said by counsel for respondent in regard to the great hardship imposed upon the discoverer of a vein by compelling him to define his surface claim

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before he could possibly ascertain the course of the vein. If we are right in our opinion that he would be allowed a reasonable time for tracing, the supposed hardship does not exist. If we are wrong, and if the discoverer must set his stakes without stopping to trace the vein, even then, as we have shown, he is better off since, than he was before, the statute. His surface lines will necessarily include at least six hundred feet of the vein, and may include upward of one thousand six hundred. In the latter case he may be compelled to re-adjust his lines so as to take only one thousand five hundred feet but in any case he can secure six hundred feet. Before the statute he could claim no more than four hundred feet of the vein, and of that he was not secure for a day. The moment he developed rich ore he was beset by trespassers, and in order to enjoin them from stealing his property, was obliged to trace the vein between them and the location point. He was harassed with litigation, and his means often entirely consumed in the prosecution of work not necessary for the development of his mine, but essential for the vindication of his title. Under the new law this source of vexation and expense is entirely swept away. Within his surface lines the discoverer of a vein is secure, and he might well consent to sacrifice something in the extent of his claim for the sake of that security. So far, however, from having to make such a sacrifice, his claim, at the very worst, is more ample than it ever was before. Sound policy, therefore, concurs with the language of the statute in sustaining our conclusion that a vein can only be located by means of a surface claim. How soon after the discovery of the vein "the location must be distinctly marked on the ground so that its boundaries can be readily traced" (R. S., 2324), we do not decide, but until it is so marked we are clear that the location is not complete, and the law has not been complied with.

So far we agree entirely with the views of counsel for appellant; but, although we are satisfied that a location must be of a surface claim, and that the boundaries and extent of the claim must be plainly defined by stakes or marks on the ground, it does not appear to be a necessary consequence that the least admissible marking is by posts or monuments at all the corners of the claim.

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We are aware that the commissioner of the land office has recommended the planting of posts at the corners and the erection of a sign board with the name of the claim, the names of the locators, etc., at the location point, and undoubtedly a compliance with these recommendations would be sufficient to satisfy the law in this particular. But at the same time we think it may be satisfied by something less. There is, after all, something in the fact that it is a mining claim and not an agricultural claim that is being located, and some account should be taken of the customs, habits and circumstances of a mining community in determining what is a sufficient marking of a mining claim. The vein is always the principal object that the locator has in view; it is generally, after location and work at the location point, a conspicuous feature of the locality; it is the first thing that attracts the attention of mining men; the surface claim by which it is to be located ought to conform to its course; the end lines must be parallel, and, as they ought to conform to the dip of the ledge as nearly as practicable, they ought to be at right angles to the side lines, so that if the center line of the claim is once established the boundaries are thereby fixed and may be readily traced.

The object of the law in requiring the location to be marked on the ground is to fix the claim, to prevent floating or swinging, so that those who in good faith are looking for unoccupied ground in the vicinity of previous locations may be enabled to ascertain exactly what has been appropriated in order to make their locations upon the residue. We concede that the provisions of the law designed for the attainment of this object are most important and beneficent, and that they ought not to be frittered away by construction. But it must be remembered that the law does not in express terms require the *boundaries* to be marked. It requires the *location* to be so marked that its boundaries can be readily traced. Stakes at the corners do not mark the boundaries; they are only a means by which the boundaries may be traced. Why not, then, allow the same efficacy to the marking of a center line in a district where the extent of a claim on each side of the center line is established by the local rules? It would be safer and therefore better to comply with the recommenda-

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tions of the land office and erect stakes at the corners of the claim, but if the grand object of the law is attained by the marking of a center line we can see no reason why it should not be allowed to be sufficient.

In this case the locators of the Paymaster marked the center line of their claim on the tenth of October, 1872. No miner, no man of common intelligence acquainted with the customs of the country, could have gone on the ground and seen the monument, notice and work, at the discovery point, and the two stakes, one three hundred feet southeast of the location monument, marked "Southeasterly stake of Paymaster," the other twelve hundred feet northwest of the location monument and marked "Northwesterly stake of Paymaster," in a line with the croppings and with the discovery point, without seeing at a glance that they marked the center line of the claim. By the rules of the district and the laws of the land he would have been informed that the boundaries of the claim were formed by lines parallel to the center line and three hundred feet distant therefrom and by end lines at right angles thereto. With this knowledge he could easily have traced the boundaries and, if such was his wish, ascertained exactly where he could locate with safety. We conclude, therefore, that the Paymaster location was sufficiently marked on October 10, 1872. At that time the Shark location had not been marked in any way, and whether the law allows a locator a reasonable time or not to mark his boundaries, protecting his full claim in the meanwhile, the same result equally follows. If the Paymaster was not marked within a reasonable time after the discovery, then certainly the Shark was not, for the first was marked within three months and the latter not until more than eighteen months after discovery; so that the Shark claim was lost by the failure to mark its location within a reasonable time. If, on the other hand, the Paymaster location was marked within a reasonable time, and such time is allowed, then the Shark was thereby excluded. If no time for tracing is allowed, and the first to mark his boundaries is first in right, then the Paymaster location holds the claim, because it was first defined by monuments on the ground. Unless the Paymaster locators failed in some other particular to comply with the law, there is no hypothesis upon which any-

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thing can be claimed under the Shark location. But it is contended that the Paymaster location was rendered invalid by non-compliance with the rules of the district and the law of Congress respecting the notice and record of claims. There is no doubt that in order to secure the right of possession to a mining claim there must be a compliance not only with the laws of the United States, but also with such local regulations of the mining districts as are not in conflict therewith (R. S., 2324), and if the miners of the Ward district have made the posting and recording of location notices essential, the courts are not at liberty to dispense with them.

The original laws of the district were adopted May 1, 1872, ten days prior to the passage of the act of Congress, which, as we have seen, introduced an entirely new system of making locations, a system in which the preliminary posting and recording of notices is entirely out of place, except as a means of protecting a claim during the time necessary for tracing the ledge and marking the boundaries of the location. When the location is thus marked, all that the notice and record were ever intended or expected to accomplish is effected in a manner far more satisfactory and complete. In place of a very imperfect, and often misleading, notice of what was claimed, there is a plain and unambiguous notice to all the world of the exact position and extent of the location. It might well have been held, therefore, with respect to the rules adopted May 1, 1872, that their requirements as to the posting and recording of notices were superseded by the act of Congress of May 10, 1872; that they were merged in the higher and more efficacious rule of the statute, or at least that, if they continued of any force whatever, it was only as a means of protecting a vein discovery during the time reasonably necessary for tracing its course and marking the boundaries of the location, and consequently, that if the discoverer chose to mark his location in the beginning, or actually did so at any time before an adverse claim was made, his failure to post and record a notice would count for nothing.

But the rules of the district were revised on the first of October, after the passage of the act of Congress, and the provisions, with respect to the notice and record of claims, were

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re-adopted without any additional provision for bringing them into sensible relation to the law. They do not purport to supply a means of holding a claim pending the marking of the location on the ground, but stand as substantive and independent requirements, a compliance with which is essential to the validity of a claim. We are not willing under the circumstances to go to the extent of holding that their observance can be dispensed with, even where a location has been plainly marked before the making of an adverse claim. We will assume that it was necessary for the locators of the Paymaster not only to have marked their location before the Shark locators complied with the law, but also to have posted and recorded a notice of the claim. Did they do so?

There can be no question that the original Paymaster notice was all that the law requires. The only objection to it is that it did not contain in itself a description of the claim by reference to some natural object or permanent monument. It was not necessary that it should. It is only the *record* of the claim that is required to contain such a description; and there are excellent reasons for making a distinction between the notice and record in this particular. A notice is generally, and for safety ought always to be, posted immediately upon the discovery of the vein, before there is any time to survey the ground and ascertain the bearings and distances of natural objects or permanent monuments in the neighborhood; and besides, the claim referred to by the notice is always sufficiently identified by the fact that it is posted on, or in immediate proximity to, the croppings. A notice claiming a location on "this vein" has only one meaning. But the notice is exposed to the danger of removal by adverse claimants, or destruction by the elements, and for permanent evidence of the location its record is provided for. The record, if it consisted of a mere copy of the notice, would not identify the claim, and there would be an opportunity as well as a temptation to the locators, upon the discovery of a more valuable mine in the vicinity, to prove, by perjured witnesses, that their notice was posted on that mine. The floating of claims was by no means an infrequent occurrence prior to the act of 1872, and if such attempts were seldom completely successful, they were always vexatious, and often the means of levying a

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heavy blackmail. It was on this account that the *record* (not the notice) was required to contain "such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim." R. S., 2324. It is a sufficient compliance with this provision of the law if the description of the *locus* of the claim is appended to the notice when it is recorded. But by reference to the foregoing statement of facts it will be seen that not only did the record of the Paymaster location contain the necessary description; it was also contained in the body of the notice as posted on the ground. "Situated about fifteen hundred feet N. W. by N. of the 'Mountain Pride lode,'" is the description in the notice; and as no objection to it was made upon the ground that the "Mountain Pride lode" was not a well-known natural object, at that distance and in that direction from the Paymaster location monument, we presume it was, in fact, a good description. The record also contained the names of the locators and the date of the location, and thus fulfilled every requirement of the act of Congress: R. S., 2324. But it was changed by Ward and Henry, and it is contended that after those changes it was no longer a good record.

The argument in support of this point is about as follows: Pearson, whose name was in the original notice, as first recorded in the little book, was one of the locators of the claim; he had a vested right, and could not be deprived of his interest by the erasure of his name from the notice and record, and consequently after his name was scratched out the record no longer contained the names of the locators, and was void. We do not think it is by any means clear that Pearson ever acquired any interest in the claim. It does not appear that he ever assented to the use of his name as a locator by Ward, who actually made the discovery and posted and recorded the notice, and it does appear that there was some sort of arrangement by which Ward was to divide his discoveries equally among those whose names were afterward signed to the notice. If Pearson had no right to a share in the discovery, and if Ward merely inserted his name by mistake, or under some misapprehension, and erased it before the claim had been perfected by work or the marking of its boundaries, it is difficult

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to see upon what ground he could claim to have ever had any vested right as a locator. But whether he had or not is a question between him and the other locators of the Paymaster. As to outsiders, the notice and record were sufficient. They contained the names of those who claimed to be the locators, and served every purpose of the law—that is, they identified the claimants and the claim.

The subsequent alteration of the notice by changing the words westerly and easterly to northerly and southerly had no effect upon the rights of the parties. The only purpose of those words was to show in which direction from the discovery point the claim extended one thousand two hundred feet, and in which direction its extent was only three hundred feet. Either set of words served the purpose equally well. No doubt when the vein was first discovered its course seemed to be east and west; after a certain amount of development it seemed to run north and south, and the notice was changed for the perfectly innocent and even laudable purpose of giving to all whom it might concern a better description of the claim. The corresponding alteration in the record was made with the same motive, at least the court finds that it was done without any fraudulent intent; and certainly it was wholly immaterial. There was no swinging of the location effected by this change in the notice and record. The claim was never fixed until the stakes were set; and so far as the notice was concerned it claimed one thousand five hundred feet of the vein, no matter where it might run. If it was good for anything it was good for what it claimed pending the marking of the location. The changes and erasures in the record were certainly irregular, and if they had been material, or if they had not been satisfactorily explained, might have afforded good grounds for excluding it from evidence. But they were satisfactorily explained. They were not designed to defraud any one, and had no such effect. We think that the comments of the district judge on this matter are very just. "Mining recorders are a class of officials that must be treated with a great deal of forbearance and indulgence. They are often entirely ignorant of legal forms, and have no appreciation of the horror with which an ordinary lawyer views the erasure or alteration of records and other documents. Where no

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fraud or deception is intended, their blunders must not be construed into crimes."

This disposes of the first proposition of appellant. The second and third are entirely without merit, and as they relate to well settled doctrines of the law, they will be very briefly adverted to. There is not the slightest evidence of an intention on the part of the Paymaster locators to abandon their claim. The act of Henry in changing the language of the notice on the tenth of October, 1872, proves only that he had abandoned the opinion that the course of the ledge was east and west. So far from proving an intention to abandon a foot of his claim on the ledge, it proves exactly the reverse.

Nor do the facts present a single element of estoppel. Each party had exactly the same means of information. When the Shark location was made it was as much the business of its locators to know whether it was on the Paymaster vein as it was of Ward, the recorder. The truth probably is that no one at that time thought the two claims would conflict. It is idle, therefore, to say that any culpable silence on the part of Ward caused the expenditure of labor and money on the Shark. If the locators of that claim were deceived it was their fault and they must suffer the consequences.

As to the change in the Paymaster notice from east and west to north and south, that was, as we have seen, wholly immaterial. The simultaneous setting of the stakes entirely superseded the calls of the notice, and was the first thing that ever fixed the boundaries of the claim. If, after that, the Shark locators continued at work, they did so with their eyes wide open, as they did everything else from the beginning to the end of their attempts to locate the ground. From the outset, they had the same opportunities to know the truth that the other party had. If they have any better claim to the property than the defendant, it is not because they were deceived or misled, but only because they can show a technical compliance with the law, while their adversaries can not. It is upon this ground alone that their case has any semblance of strength, and upon this ground we think it clearly fails.

Since the foregoing was written two cases, *Gelcich* v. *Moriarty*, (9 M. R. 498.) and *Holland* v. *Mount Auburn M. Co.*, (9 M. R. 497.) have been decided by the Supreme Court of

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California, in both of which it is assumed, as a point beyond question, that the marking of a mining location on the ground so that its boundaries can be readily traced, is absolutely essential to the validity of the claim. This is in perfect accordance with our own views as above expressed. But in the latter of these cases it seems also to be held that the marking of the center line of the claim is not sufficient to satisfy the requirements of the law. The opinion of the court is very brief, and no reasons are assigned for the conclusions reached. We have, however, been led by that decision to thoroughly reconsider our own opinion on this point, and the arguments of counsel *pro* and *con*. The result is that we are satisfied of the correctness of our first conclusion. A mining claim consists of a certain breadth of surface, to be laid off on each side of the line of the croppings, with the mineral deposits included therein. The center line, as a matter of course, is to be a straight line conforming to the general strike of the vein as nearly as that can be ascertained. The side lines are to be parallel to the center line, and if, as we assume to be the proper construction of the law, the end lines must be parallel and conform to the dip of the vein, which is at right angles to its strike, it follows, with the conclusiveness of a mathematical demonstration, that when the center line is once definitely fixed the boundary lines can be traced (that is, followed out) with absolute certainty. It may be that they could not be traced as easily and readily as if stakes were set at the corners, but the difference would be very slight and of no practical consequence. In any case we think that the law should receive as liberal and beneficial a construction as is consistent with the object which Congress undoubtedly had in view in passing it. That object, we are satisfied, was not to save intending locators a slight amount of labor in tracing older claims, but it was to make the boundaries of such older claims certain and immovable; to put an end forever to the shifting and floating of claims; to do away with an existing and intolerable evil. The whole object of the law is accomplished whenever, from the monuments on the ground, the boundaries of a mining claim can be traced with absolute certainty and without any practical difficulty, and for that purpose a definitely fixed center line is sufficient.

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The judgment and order appealed from ought to be affirmed, and it is so ordered.

HAWLEY, C. J. (concurring in result).

I concur in the conclusions reached by the court, that the judgment of the district court ought to be affirmed; but I am unwilling to give an unqualified approval of the construction given to the mining laws of the United States.

If I entertained the opinion, as expressed by the court, that "it is a surface parallelogram not less than fifty feet in width that must be located;" that the location on a vein "must be made by taking up a piece of land to include it;" that a vein "can only be located by means of a surface claim, and held only to the extent that it is included in the surface lines," and if—upon these points—I agreed "entirely with the views of counsel for appellant," I should be inclined to agree with their conclusions that it is the surface location that "must be distinctly marked on the ground so that its boundaries can be readily traced."

But I do not believe that it was the intention of Congress, by the passage of the several acts referred to in the opinion of the court, to produce an entire revolution in the system of locating mining claims. Some very important changes have been made and the rights of the locators have been enlarged and made more specific; but in my judgment it is, as it was under the old system, the vein of quartz—the lode—that is the principal thing constituting the location. The surface ground is but an incident thereto. The location of such a mining claim is distinctly marked on the ground so that its boundaries can be readily traced, by the placing of stakes along the lode and at the ends of the location, or by such other monuments or marks as will clearly designate the number of feet in length and the particular lode located. In my judgment the location need not necessarily be the taking up of "a piece of land" in the form of a parallelogram. When the vein or lode is sufficiently identified and marked, as above stated, the laws of the local district fix the number of feet in width—of the surface ground—to which the locator is entitled. It being of course understood that "No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less

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than twenty-five feet on each side of the middle of the vein at the surface."

I differ with the court upon another point discussed in the opinion. I think that after the vein or lode is properly located the locator thereof has the right to fifteen hundred feet along the course of the lode, "in whatever direction it runs, irrespective of the vertical side lines of the surface boundaries" (Dissenting Opinion, *Golden Fleece* v. *Cable Consolidated*, 12 Nev. 331), and that he would only be entitled to fifteen hundred feet in length, although the vein took such a course as to embrace more than fifteen hundred feet within the end lines of his surface location.

O'KEIFFE ET AL. v. CUNNINGHAM ET AL.

(9 California, 589. Supreme Court, 1858.)

[1] **Location of mining, over tailings claim.** A party may locate a claim for mining purposes upon ground already claimed for fluming purposes, and the locations will not conflict; but it does not follow that a claim already located for mining purposes can be located or used as a place of deposit for tailings. When the location for fluming purposes is prior, the mining right will be subject to the prior right of deposit.

Appeal from the District Court of the Fourteenth Judicial District, County of Nevada.

This was an action of trespass, brought by the plaintiffs against the defendants for discharging their tailings on the mining claims of plaintiffs. The complaint alleges that plaintiffs were lawfully possessed of seventeen mining claims; that such possession dates from the 3d day of April, 1856; that while so possessed defendants discharged, through a flume, large quantities of water and tailings upon the ground of plaintiffs, and thereby covered up and incumbered their mining claims, etc.

The defendants deny the allegations in plaintiffs' complaint,

[1] Approved, *Nevada Co.* v. *Kidd*, 37 Cal. 315; see *McDonald* v. *Bear River Co.*, 1 M. R. 626; *Rogers* v. *Cooney*, 7 Nev. 213; *Post* TAILINGS.

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and set up prior location, and right to discharge such tailings upon the ground occupied by plaintiffs. The facts, sufficient to elucidate the points decided by the court, appear in the opinion of the court. Trial was had before a jury, the defendants had verdict and judgment. Plaintiffs moved for a new trial, which was denied, and they appealed.

DUNN & ROWE, for appellants.

MCCONNELL & DIBBLE, for respondents.

BURNETT, J., delivered the opinion of the court, TERRY, C. J., concurring.

An opinion was delivered in this case at the April term, 1857[1], and a re-argument had at the succeeding July term. The judgment was considered erroneous in consequence of the admission of certain testimony. The defendants' counsel, in answer to the objection to the admission of this testimony, insisted that no exception had been made by the plaintiffs in the court below. This was his only answer to the objection. The counsel had overlooked the fact that an exception had been taken. But upon the rehearing we became satisfied that the testimony in reference to the other flume was admissible for the purpose of showing that the gravel and other refuse matter, (called, in the technical language of the mines, tailings,) deposited upon the alleged claims of plaintiffs, were placed there, at least in part, by other parties, with whom defendants had no connection.

This leads us to consider the other points made by the plaintiffs.

The court refused to give the third and eighth instructions offered by plaintiffs. The third instruction was properly refused, and the refusal of the eighth, relating to the measure of damages, did the plaintiffs no injury, as the jury found a general verdict for the defendants.

The only remaining point is, that the court erred in refusing to grant a new trial upon the ground that the verdict was against law and evidence.

[1] Not reported.

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The testimony, as spread upon the record, is voluminous, and yet concisely stated. The facts of the case were complicated, and, at first view, there would seem to be a conflict of testimony. We have given the record the most patient consideration, and we can not see any material conflict in the testimony of the different witnesses, as to the main facts.

The plaintiffs introduced evidence to show that they owned two sets of claims—the upper and lower; the first located in 1851, and the second in July, 1855. In August, 1855, Clark commenced the construction of a flume, called Clark's Flume, near the lower end of the second set of claims. He was forbidden by the plaintiffs, and thereupon plaintiffs and Clark subsequently entered into a written article, by which it was agreed that Clark should have the privilege of entering upon the mining claims of plaintiffs, and erect upon and over the same a water-flume, so as to carry the water and tailings flowing from Clark's claims, located above, across the claims of plaintiffs, but not to interfere with the working of the same in any manner, and not to deposit thereon any tailings. Clark afterward sold his flume to defendants, who entered under the purchase.

The defendants, coming in under purchase from Clark, obtained only the right that Clark possessed, and were bound by the compromise made by him with plaintiffs. The defendants entered in subordination to the title of plaintiffs, and were bound accordingly: *Ellis* v. *Jeans*, 7 Cal. 409. The court very properly instructed the jury in regard to this point.

The next inquiry was as to what constituted the "mining claims belonging" to plaintiffs at the date of the article, 30th of August, 1855, within the meaning of the instrument.

It seems perfectly established that Frany & Walker located the lower set of claims on the 5th of July, 1855; but they only located for what is called fluming purposes. The court very properly instructed the jury that one party may locate the same ground for fluming purposes, and another party, at the same or a different time, may locate for mining purposes, and the two locations, being for different purposes, will not conflict.

The plaintiffs proved by Forbes that they located the lower set of claims in July, 1855, and before Clark com-

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menced the construction of his flume, and that the claims were staked off and recorded. The statements of this witness are clear and explicit affirmative evidence, uncontradicted by other witnesses, and consistent in itself. And not only so, but it is confirmed by facts stated by Clark, a witness for both parties, as Clark says that when he commenced his flume plaintiffs claimed to own both the upper and lower sets of claims.

Then, as to the fact that defendants, after the purchase from Clark, exceeded the limited rights they purchased, by flowing water and depositing tailings upon the lower claims of plaintiffs, to their injury, it seems too clear to admit of any reasonable doubt.

As to the question whether the plaintiffs included within their limits more ground than they were entitled to under the rules and regulations of that locality, the defendants, coming in under Clark, were not in a situation to raise it.

The jury seems to have been misled by the fact that the Union Company had been in the habit of depositing the tailings from their flume upon the lower claim of plaintiffs since 1854. From this they seem to have inferred the right of defendants to do the same thing. But such a conclusion does not follow. A party may take up a claim for mining purposes that has been and still is used as a place of deposit for tailings by another, and his mining right may be subject to this prior right of deposit; but the claim of the miner will not be subject to those who come after him.

We always feel great reluctance to disturb the verdict of a jury. But in this case, we are compelled to say, the plaintiffs are entitled to a new trial.

Judgment reversed and cause remanded.

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DUNNING ET AL. v. RANKIN ET AL.

(19 California, 641. Supreme Court, 1862.)

[1] **Location notice—When contents may be shown.** Where, to prove the priority of their possession of a mining claim, plaintiffs relied upon a notice which had been posted on a tree on the claim, and produced a witness who swore to having often seen the notice, and that when last seen it was part torn and the rest illegible: *Held*, that this was sufficient proof to let in parol evidence of its contents, and that stricter proof in this class of cases should not be required.

General objection. An objection to testimony as to the extent of a location as given by a witness: *held*, too general to be considered.

Appeal from the Fourteenth District.

The facts as to the question asked as to the extent of plaintiffs' location and defendants' objection thereto, mentioned in the last paragraph of the opinion, are as follows: The witness (Andrews) who had testified as to the defaced appearance of the notice the last time he saw it, being on the stand, was asked by plaintiffs' counsel, "What was the extent of the location of plaintiffs' grantors?" Witness replied, "That it extended five hundred and fifty feet up said cañon from said tree; there was a notice on the yew tree which claimed five hundred and fifty feet up the cañon; this notice he saw and read in 1855, at which time he was an owner and worked in the claims; that he saw the notice the last time in 1857, when it was partly torn down, and did not think it could be read; did not know what became of it, or the tree on which it was posted." Defendants' counsel then asked witness "From what source he derived his knowledge as to the extent of said location?" He replied, "From his recollection of the contents of said notice, and from the fact that he had owned and worked there himself."

Defendants' counsel then objected "to the introduction of

[1] It has never been usual in Colorado to require the location notice or stake to be produced, but proof of contents has always been allowed. If the notice itself were to be removed, it would tend to destroy a muniment of the locator's title. Such notices are often written on a blazed tree or stump, or painted or penciled on a windlass: See *Kelly* v. *Taylor*, 5 M. R. 598.

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said testimony as to the extent of said location, on the ground that the loss of said notice had not been shown."

Objection overruled, defendants excepting.

McCONNELL & GARBER for appellants.

A. C. NILES and GEO. CADWALLADER, for respondents

COPE, J., delivered the opinion of the court, FIELD, C. J., concurring.

This is an action to recover certain mining claims to which the plaintiffs set up a right by prior possession. On the trial of the case they relied in proof of their priority upon a notice which had been posted on a tree at one end of the claims. The notice itself was not produced, and the first objection taken is, that its contents were allowed to be proved by secondary evidence. The witness who testified upon the subject stated that he had seen the notice frequently; that when he last saw it a part of it was torn off and the residue so much defaced that he thought it could not be read. This was sufficient to warrant the admission of the evidence objected to, and we think that greater strictness of proof ought not to be required in such cases. The notice was necessarily placed in an exposed position, and it is reasonable to infer that the part torn off had been carried away or destroyed by the elements. The failure to produce the part remaining was sufficiently excused by the statement of the witness as to its illegible condition. It is true the witness did not express himself in positive terms, but as the whole notice could not be produced, we think the court was justified in admitting the evidence.

The point as to the question asked in regard to the extent of the original location of the plaintiffs is not maintainable upon the exception taken. The objection was general, and as the plaintiffs might have obviated the difficulty by changing the form of the question, the ground of the objection should have been stated. The case seems to have been fairly tried, and we have no doubt that justice has been done.

Judgment affirmed.

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[1]TABLE MOUNTAIN TUNNEL CO. v. STRANAHAN ET AL.

(20 California, 198. Supreme Court, 1862.)

Parol transfer. A written conveyance is not necessary to pass the title to a possessory mining claim.

Statute of Frauds. Possessory rights are not within the Statute of Frauds; they may be conveyed by the transfer of possession.

Corporation—Successor to its organizers. The owners of a mining claim became incorporated and placed their corporation in possession. *Held*, that the title passed as effectually as if the transfer had been by deed.

[2]**Possession extends to bounds.** When a claim is distinctly defined by physical marks, occupation of a part is possession of the whole, although the party does not enter under district rules (affirming *English* v. *Johnson*, 17 Cal. 108), and the exclusion of evidence tending to prove such a possession as would justify a recovery in ejectment, deprives the jury of the means of arriving at a just conclusion.

Implied limit to size of claim—General usage. When there is no regulation limiting the size of a claim there is nevertheless an implied limit. No location can be so extended as to amount to a monopoly, and in the absence of local regulations prescribing a limit resort must be had to general usage.

Possession in case of too extensive claim. Where the quantity of ground claimed is unreasonable, the possession under such a location will be restricted to the ground actually occupied.

Distinction between local and general mining custom. Upon the question of the reasonable size of a mining claim a general custom may be shown whether prior to or later than the location; but a local rule stands upon a different footing and can not be introduced to affect the validity of a claim acquired previous to its establishment.

Appeal from the Fifth Judicial District.

Ejectment to recover nine hundred and twenty-six feet of an underground channel claimed by plaintiffs. The possession of the ground by defendant is admitted by the pleadings.

In June, 1852, a mining association, called the "Experimental Company," or "Allen Oliver & Co.," commenced a tunnel for the purpose of piercing an old subterranean channel in Table Mountain (then first discovered) containing gold. This company consisted originally (in May, 1852) of Allen

[1] *Same* v. *Same, Post* 465.

[2] *Stroppey* v. *Stark*, 7 Colo. 614; *Roberts* v. *Wilson*, 4 M. R. 498.

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Oliver, John Oliver, J. Stanfield, S. Stanfield, R. Darling, and J. D. Lyon.

In June, 1855, the two Olivers and Lyon placed the following notice near the mouth of the tunnel:

"Notice is hereby given that the Experimental Tunnel Company claim this channel, with all its dips and angles, through Table mountain, in a westerly or northerly direction, with the right to tunnel and work the same from this gulch or the next gulch to the westward, or from both, if found necessary.

(Signed) "ALLEN OLIVER & Co."

It does not appear that J. Stanfield, S. Stanfield or R. Darling ever worked upon the claim, or did anything to it whatever. In May, 1852, their names were used as members of the company. In June, 1852, the foregoing notice was placed up, and the tunnel was continuously worked by Daniel Oliver, John Oliver and J. D. Lyon, toward the channel of the mountain, until the second day of May, 1854.

In 1853 the bounds of this claim were run off and designated by blazed trees. This was the same as that worked by Oliver & Co., in 1852. A subsequent survey was made, by two witnesses, of this claim in 1857. These witnesses testify that they found the old blazes of the former survey on the trees.

In 1854, May 2d, Daniel Oliver, John Oliver and J. D. Lyon, in conjunction with eleven others, formed themselves into a corporation (the present plaintiff), for the more advantageous working of the claim, Allen Oliver becoming president, J. D. Lyon, secretary, and John Oliver, one of the trustees.

The record of incorporation, filed May 2, 1854, thus states the purposes of the incorporation:

"That the operations of said company shall be confined to the prosecution and completion of the tunnel heretofore known as the Experimental tunnel, which said work was commenced on or about the first day of June, 1852, and is situated in township number three, county and State aforesaid."

The notice of the old Experimental company was also taken down, and the following inserted in lieu thereof:

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"CLAIM OF TABLE MOUNTAIN TUNNEL COMPANY.

"This comprises the claim held and occupied by the Experimental company since its location, on June 12, 1852, up to this date, and is situated near Jamestown, Tuolumne county, California; said claim commences about one hundred and ten feet west from the entrance of the upper tunnel of said company, and comprises the channel there existing from this point, with its dips and angles, through Table mountain; said channel having been heretofore unworkable, on account of water, as was proven by many fruitless efforts made previous to the location of said claim.

"ALLEN OLIVER, President.

"J. D. LYON, Secretary.

"May 2, 1854."

The claim was also surveyed by the county surveyor in 1861, from the old landmarks, and a map of it produced in court.

In 1855, January 9th, the miners of Table mountain passed a code of laws, providing, among other matters, that a claim for each man should not exceed three hundred feet in width at the base of the mountain; that no person should hold more than one claim by location; that the bounds of claims should be established, and defined by permanent erections of wood or stone at each corner and a notice at each end, and should be recorded; that "companies having already located and worked upon their claims shall have one week to establish their boundaries according to the above provisions," and in the last section, that "the foregoing mining rules and regulations shall not be so constructed as to conflict in any way with any claims already located and worked upon."

The length of plaintiff's claim along the mountain, as fixed by the blazing of trees in 1853 and the subsequent surveys, was something over 4,000 feet.

Since the incorporation, plaintiff has been continuously at work driving the original tunnel and working the channel, but it does not appear that it has complied with the local mining laws passed in 1855, in respect to marking boundaries and recording.

On the tenth of January, 1855 (the day after the passage of the miner's rules), the defendants located a claim on the

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mountain in accordance with the mining rules, their boundaries embracing some 2,000 feet in length of the ground claimed by plaintiff, and defendants have since been engaged in running a tunnel into their claim, and after striking the channel, in working the same. At the time the action was commenced, the tunnel of defendants extended into the claims of plaintiff nine hundred and twenty-six feet.

The plaintiff having proved the facts in reference to its title, substantially as above stated, but having shown no conveyance to itself from the Experimental company, or any of the original locators, rested, and defendants moved the court to strike out "all testimony given by plaintiffs of any acts of ownership or possession of the ground or claim in dispute, on the part of any members of the the Experimental company, or any members of the plaintiff corporation, prior to the date of incorporation, on the ground that no conveyance had been shown to the corporation from the Experimental company, or from such members of the claim or right of possession of the latter."

The court granted the motion, to which plaintiff excepted. The court, also, at the request of defendants, instructed the jury as follows:

"The jury are instructed to disregard all testimony given on the trial in relation to the acts of the Olivers, or of the Experimental company, or any other company or person, in connection with the claim of the Table mountain company, all such testimony having been ruled out by the court.

"The Table Mountain Tunnel Company, can only claim title through their own acts, unconnected with the rights or acts of any former claimant of the same ground, and the jury are instructed to disregard all evidence given by the plaintiffs, in support of their claims of acts done prior to the second of May, 1854. Whatever rights plaintiffs may have must have accrued since that date."

The Wallaville laws, referred to in the opinion, were a set of rules established by the miners in the vicinity of Table mountain, in 1851, and amended in 1853, regulating the location and holding of ravines and surface diggings. These rules were offered in evidence by the defendants, and admitted under plaintiff's objection.

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The jury returned a verdict for defendants, and a motion for new trial having been made and denied, from this order, and also from the judgment, plaintiffs appeal.

H. P. BARBER, for appellants.

CALEB DORSEY, with whom was A. P. CRITTENDEN for respondents.

COPE, J., delivered the opinion of the court, FIELD, C. J. and NORTON, J., concurring.

The plaintiff is a mining corporation, and the suit is brought to eject the defendants from nine hundred and twenty-six feet of a mining claim, the ownership of which is alleged to be in the plaintiff. The claim was located in 1852, by an association of individuals calling themselves the Experimental Tunnel Company, who posted a notice and proceeded with the construction of a tunnel. In 1853 the boundaries of the claim were run off and marked by the blazing of trees at the corners and along the lines, and the work of the tunnel was continued by certain of the members of the company until the plaintiff took possession in 1854. The plaintiff became a corporation on the second of May, 1854, the articles of incorporation being signed by the only members of the Experimental company who seem to have participated in the affairs of that company and specifying as the object of the corporation, "the prosecution and completion of the tunnel heretofore known as the Experimental tunnel." These members of the Experimental company were made officers of the corporation, and entered upon the discharge of their duties as such—one of them as president, another as secretary, and a third as one of the trustees. On the day the articles were filed, the notice of the company was taken down, and the following, signed by the president and secretary of the corporation, put up in its place: "*Claim of Table Mountain Tunnel Company.* This claim comprises the claim held and occupied by the Experimental Tunnel Company since its location, June 12, 1852, up to this date, situated near Jamestown, Tuolumne county, California. Siad claim commences about one hundredand ten feet west

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from the entrance of the upper tunnel of said company, and comprises the channel there existing from this point, with its dips and angles, through Table mountain; said channel having been heretofore unworkable on account of water, as proven by many fruitless efforts made previous to the location of said claim. The operations of the plaintiff were commenced immediately thereafter, and the work upon the claim has progressed continuously until the present time; the portion in controversy, however, not yet being reached. In 1857 the boundaries of the claim were again run off and marked, and in 1861 a survey was made and the original marks were still visible.

The defendants claim under a location made in 1855, overlapping that of the plaintiff to the extent mentioned—of nine hundred and twenty-six feet. On the day preceding the location, the miners of the district adopted a code of rules for their government, and the location was made in the manner designated in these rules. The defendants afterward proceeded to mine within the boundaries of the plaintiff's claim, and they contend that under their location they were entitled to do so. The rules adopted were limited in their provisions to claims subsequently acquired, and claims previously located were excluded from their operations.

The case was tried by a jury, and various exceptions taken during the progress of the trial are relied upon for a reversal. The plaintiff gave in evidence the facts stated in relation to the Experimental company, and one of the errors assigned is that this evidence was afterward stricken out. The court considered a conveyance from the company necessary to invest the plaintiff with their rights, and the evidence was stricken out on the ground that no conveyance had been shown. We are of opinion that the court erred in this respect, and that a conveyance by deed would have passed no greater interest than the plaintiff acquired by a transfer of the possession. Rights resting upon possession only, and not amounting to an interest in the land, are not within the Statute of Frauds, and no conveyance, other than a transfer of possession, is necessary to pass them. The rights of the company were of this character and the transfer of possession was as effectual for the purpose intended as if it had been accompanied by a conveyance in writ

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ing. The plaintiff was put in possession as the successor in interest of the company, and the intention undoubtedly was that whatever rights the company had should pass with the possession. There was no reservation in that respect, and the only rational theory upon the subject is that the plaintiff was to take the place of the company, and stand in the same position with regard to the claim. The possession of the plaintiff being assailed, the acts of the company showing the character and extent of that possession were at least pertinent, and the ground assumed did not justify their exclusion. If these acts were sufficient in point of law, the plaintiff was entitled to the benefit of them, and the case of *English* v. *Johnson*, 17 Cal. 107, is decisive of the matter. There also the subject of dispute was a mining claim, the plaintiff relying upon prior possession, evidenced by work done, and by posting notices and marking the boundaries. There were mining regulations in force in the district, but neither of the parties claimed under them, and the question was as to the sufficiency of the evidence of possession. "In mining claims," said the court, "we require no other acts, as evidence of possession, than those usually exercised by the owners of such claims. A miner is not expected to reside upon his claim, nor to cultivate the ground, nor to inclose it. The claim is usually of a small strip of land compared with the extent of ground generally taken up for agricultural purposes. Its only value is in working it and extracting minerals. * * * Where a claim is distinctly defined by physical marks, possession taken for mining purposes embraces the whole claim thus characterized, though the actual occupancy or work done be only on a part, and though the party does not enter in accordance with mining rules." The jury had been instructed that a possession of this character was sufficient to maintain the action, and the instruction was held to be a correct exposition of the law upon the subject. In the case at bar, the evidence stricken out tended to prove a similar possession, and as the plaintiff might have recovered upon it, the evidence was improperly excluded. The effect of the evidence was a matter for the jury, and whether or not such a possession was proved is an inference from the facts which they alone were competent to draw. The court had nothing to do with it, and the exclusion of evil-

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dence tending to influence the result deprived the jury of the means of arriving at a just conclusion.

It is suggested that, under this rule, there is no limit to the quantity of ground that may be located as a mining claim. This objection applies, however, to every location not made in pursuance of some regulation limiting the quantity, and the result flowing from it is that no such location would be valid. Of course it was not intended to push the objection to that extent, but we can not admit the premise and avoid the conclusion to which it necessarily leads. If the want of a limit shows the rule to be wrong, no rule subject to the same objection can be right, and a location made under a rule of this description must of necessity be invalid. There is another answer, however, which is more satisfactory, as it goes to the foundation of the objection and furnishes a practical solution of the difficulty. No location can be so extended as to amount to a monopoly, and, in the absence of local regulations prescribing a limit, recourse must be had to general usage. If the quantity of ground included be unreasonable, the location will not be effectual for any purpose, and possession under it will only extend to the ground actually occupied. In other words, the extent of the occupancy will determine the extent of the claim, and whether the quantity is unreasonable or not must depend upon the customs prevailing generally upon the subject.

The mining laws of the "Wallaville District" were improperly given in evidence, for the reason that they were inapplicable to a claim of this character.

The judgment is reversed, and the cause remanded for a new trial.

On petition for rehearing, COPE, J., delivered the opinion of the court, FIELD, C. J., and NORTON, J., concurring.

We are asked by the counsel for the respondent to modify certain portions of the opinion delivered by us in this case. On looking at the mining rules of the Table Mountain District, we find that an error was committed in saying that claims previously located were excluded from their operation. The rules contain a provision to that effect, but they also provide that persons holding such claims shall have one week to establish their boundaries in the manner therein required. A

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construction of these provisions is unnecessary for the purposes of this appeal, and we refer to the matter to guard against misapprehension, to which the language of the opinion would probably lead.

The counsel objects to that portion of the opinion relating to the mode of determining the reasonableness of a claim in the absence of local regulations limiting the extent. He understands us to have said that in such case recourse must be had to general usage previously established, and argues that under this rule there would be no means of imposing a limitation upon persons whose claims were located anterior to the existence of customs of a general nature fixing the quantity. We think the opinion does not warrant the view taken of it, but it is proper to say that while a general custom, whether existing anterior to the location of the claim or not, may be given in evidence upon the question of extent, a mere local regulation stands upon a different footing. The former results from the general sense of the mining community as to what is just and reasonable in that respect, and in connection with the particular circumstances of the case may be safely relied on in arriving at a conclusion. The latter owes its origin to the will and discretion of a few individuals, and operating directly upon the location sought to be limited, would be an improper and unjust criterion of action, as in many cases its effect would be to deprive persons of property to which, prior to its adoption, they had a valid legal right.

Rehearing denied.

TABLE MOUNTAIN TUNNEL CO. v. STRANAHAN ET AL.

(21 California, 548. Supreme Court, 1863).

[1] **The ruling of the Supreme Court in a particular case** becomes the law of that case, upon further proceedings, even upon points not essential to the decision.

Application of the rule. The Supreme Court, upon the former appeal,

[1] *Lucas* v. *San Francisco*, 28 Cal. 591; *Oakley* v. *Aspinwall*, 13 N. Y. 500; *Fraser* v. *Davie*, 15 S. C. 496.

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having passed upon the extent of ground to which a location was limited, and the language of the court having been embodied in an instruction asked on the second trial, it was error to refuse it, as the law of the case.

Appeal from the Fifth Judicial District.

A report of the proceedings on the former appeal will be found in 20 Cal. 198.[1] All other material facts are stated in the opinion.

A. P. CRITTENDEN, for appellant.

H. P. BARBER, for respondent.

COPE, J., delivered the opinion of the court, FIELD, C. J., and NORTON, J., concurring.

This case was before us at the April term, 1862, on appeal from a judgment in favor of the defendants. The judgment was reversed, and the cause remanded for a new trial, and the present appeal is from a judgment in favor of the plaintiff.

The plaintiff is a mining corporation, and the facts, as elicited at the trial, are not materially different from those stated in our previous opinion.

The point in dispute is the location of a mining claim, and one of the errors assigned is, that the court refused the following instruction: "No location of a mining claim can be so extended as to amount to a monopoly, and in the absence of local regulations prescribing a limit, recourse must be had to general usage. If the quantity of ground included be unreasonable, the location will not be effectual for any purpose, and possession under it will only extend to the ground actually occupied. In other words, the extent of the occupancy will determine the extent of the claim, and whether the quantity be unreasonable or not must depend upon the customs prevailing generally upon the subject."

This instruction was taken literally from the opinion delivered by us when the case was here before, and it is difficult for us to understand upon what ground the court refused to give it. It is too late now to discuss the question of its correctness, for the matter has been adjudicated; and whatever doubts may exist in regard to the conclusion arrived at, it has

[1] S. C., 9 M. R. 157.

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become the law of the case. The counsel for the plaintiff contends that the point was not involved in the questions raised on the former appeal, and that so much of the language used as limits a location in the case put to the extent of the actual occupation was mere *obiter*. It is true, perhaps, that an opinion upon the point was not essential to the decision of the case, but it was important for the purposes of a new trial; and it was in that view that we considered the matter and passed upon it. It was a matter necessarily involved in the issue to be tried, and the principle of *res judicata* is undoubtedly applicable to its determination.

The judgment is reversed and the cause remanded for a new trial.

VAN VALKENBURG ET AL., Appellants, v. HUFF ET AL., Respondents.

(1 Nevada, 142. Supreme Court, 1865.)

A Nevada transcript. Papers and testimony copied into the form of a transcript, without certificate of judge or clerk, do not constitute a transcript, but were, under the circumstances, considered as such.

Maps. The necessity of maps in review of mining evidence, indicated.

General charge. In the statement of a general principle of law, it is not improper for the court to allude to exceptions to the rule, or to notice such circumstances as would prevent its operation.

[1] **Estoppel by declarations of locator.** Where A has located upon an outcrop, and B afterward locates near by and is encouraged by A to proceed—he saying that there are two ledges, and that their claims do not interfere—and afterward it is ascertained that there are in fact two ledges, having different and diverging dips as they descend, but mingling their croppings at the surface, the declarations of A may be taken as evidence that he located but one of the ledges, and may act as an estoppel to prevent his claiming both.

The possession of one tenant in common inures to the benefit of all in the absence of some decisive act amounting to an ouster.

[2] **Presumption of assent to use of name.** A party in whose name a location of a mining claim is made is presumed, *prima facie*, to assent to the same.

The locator named is owner. If A in locating use the name of B, he can

[1] *Harrington* v. *Chambers*, 1 West C. R. 63; *Patterson* v. *Hitchcock*, 5 M. R. 542.

[2] *Morton* v. *Solambo Co.*, 4 M. R. 463.

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not sue for the claim in his own name; his position is that of servant to the owner, and his possession the possession of the owner; and he could only acquire an independent right by re-locating in his own name.

Appeal from the District Court of the Third Judicial District, Territory of Nevada, Hon. H. M. JONES, presiding.

PITZER & WILLIAMS, for appellants.

STEWART, BALDWIN & HILLYER, for respondents.

The facts are stated in the opinion.

By the Court, BEATTY, J.

In this case the respondents contend there is no statement on motion for new trial, and that in the absence of such statement this court can not review the action of the court below in refusing a new trial. The verdict was rendered and judgment entered by the clerk on the 24th day of March, 1863. On the 26th day of March, 1863, a notice of motion for new trial was served. This notice appears to be formal and correct.

On the 3d day of April another paper is served on respondents' counsel, which is headed "motion for new trial." Then in the body of the paper follows a *notice* that a new trial will be moved for, on a specified day; that the motion will be founded on certain grounds, viz., that the evidence is insufficient, etc. Then follows a statement that certain writings, notices, etc., will be relied on in support of the motion.

This is a rather informal statement, yet it is, in our opinion, a good one. If the papers and documents referred to are sufficient to show error in the court below, then the appellants should have a new trial. But whilst this statement was sufficient for the motion in the court below, there seem to have been no steps taken to identify the papers used in that court.

There is no statement on appeal. There is no certificate of either judge or clerk as to whether the papers copied in transcript were the papers used or referred to in the court below on the motion for a new trial. Reference is made in the statement to the testimony as taken down by a shorthand reporter appointed by the court. There is a large mass of evidence included in the transcript, but there is nothing to show it is

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the evidence taken down by the reporter, nor, if taken by him, whether it is a part or the whole of the evidence. No certificate of either judge, clerk, or reporter, is attached to the evidence. The judge certifies to the instructions given and refused, and the exceptions taken to his rulings in regard to instructions. But beyond this there is no certificate to anything, unless it be the clerk's certificate to filing a paper, or some matter of that sort. Any private citizen could make out such a transcript and put in it any evidence he saw proper, and violate no law that we know of in so doing. The transcript is made up of a medley of different kinds of paper of various sizes, colors and shapes, written, much of it, in a hand that is almost illegible. Had such a transcript been filed at or just before the present term of the court, we would certainly have required the appellant to file a proper transcript duly certified, or else dismissed the appeal. But as the case came to us from our predecessors in office, and no action was taken by them for correcting the transcript or dismissing the appeal, we have waded through it and examined all the evidence presented therein.

It is proper, however, to say that nearly all the evidence appears to have been given with reference to certain maps which were before the jury. Those maps do not accompany the transcript. Therefore much of the testimony which relates to the relative locality of the works of the plaintiff and defendants is totally unintelligible to the court.

Looking, then, to the pleadings, and so much of the testimony as is intelligible, the facts of the case appear to be as follows:

In June, 1860, a claim was located by certain parties known as the Comstock Continuation Company, near the Devil's Gate, in Lyon county. The location was made of a ledge, and the notice placed on certain croppings of quartz, and claimed eight hundred feet northerly and southerly therefrom. In June, 1860, defendants made a location on a ledge in the same vicinity, and commenced work on the same.

When the plaintiffs and their predecessors made their location of the Comstock Continuation claim, they inserted among the names of the locators, H. Mason, T. Stoneking and William Miles. These were the names of certain parties living in the State of Illinois, and most probably never heard of their

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names being used in the location of this claim. These names were inserted in the notice at the instance of Moses Driscol, Mark Peters and Christian Higgings. Each of the three last-named parties had the name of a friend in Illinois placed in the notice, intending the location to be for their own benefit, but using a friend's name either to conceal their own connection with the company, or from some caprice or other motive into which it would be useless to inquire. Both companies went to work and continued to prosecute their works with considerable labor and expense up to 1862.

There is some evidence to show that from 1860 to 1862 the two companies worked amicably in the same immediate vicinity, supposing that they had separate and distinct ledges.

Inclines and shafts, tunnels and drifts, were run into the hill where the ledge or ledges are situated, by both parties, and in 1862 the works of the two companies began to interfere with each other. This interference brought on a quarrel, and finally a personal conflict between the workmen of the two companies. The plaintiffs (the Comstock Continuation Company) proving the weakest or least belligerent, withdrew from the conflict and brought suit.

The evidence would seem to indicate the plaintiffs were where they had a right to be when they were assaulted. But this action, if we understand it, is in the nature of ejectment, and even if plaintiffs were assaulted on their own ground, this could not give them a right to recover ground in ejectment which belonged to defendants. Although there may have been an unjustifiable assault on plaintiffs, made by some of the defendants or some of their servants, it does not affect the question in this case. That question is, who is entitled to the possession of the ground, or mining claim, or ledge of quartz, described in the complaint?

The plaintiffs relied on the proof of their prior location, constant work of their claim, and the *opinion* of divers witnesses that there was but *one* ledge there, and all the works of both companies were on that ledge. Also, on the facts that if there were two ledges, still the croppings were all mingled together, and their location of a claim or ledge on those croppings would give them a right to all ledges which outcropped at that place.

Defendants, on the other hand, introduced some evidence,

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and the opinion of many witnesses, to show that there were two distinct ledges; that while the two ledges came together and mingled their croppings on the surface, that underground they were distinct ledges, separated by bed rock and constantly diverging, the one being nearly perpendicular, and the other having a much greater inclination; that their location was made about two years past as of a separate ledge, since which time they had continuously worked it; that the plaintiffs knew of their claim and work done there for a long time past, and made no objection until recently.

With this general view of the facts, the question to be determined by this court is, were the instructions given by the court below correct, or were they erroneous and prejudicial to the plaintiffs?

Before examining the instructions complained of, we will say that the foregoing statement embraces all the facts which appear to us material, so far as we are able to understand them from the transcript before us, giving full weight and effect to anything therein contained. If we had had the maps, a copy of the notices of location, etc., before us, possibly some other material facts might have been shown. But we can only examine this case as far as it is made intelligible by the transcript.

The first assignment of error is this: That the court after stating what a miner acquires by posting notices, etc., goes on to say those rights will hold good against subsequent locators, "unless there should be an abandonment or extinguishment in some form, in whole or in part, of such original claim." It is contended that the qualification expressed by the words within the quotation marks was inapplicable to the state of the evidence and pleadings in this case, and calculated to mislead the jury.

It is not pretended that the principles contained in that qualification are against law, but that there is nothing in the case to give point or effect to the qualification. If there were nothing in the case to give point or effect to this qualification, we think it would not afford the appellants any grounds of complaint.

When a judge is laying down general rules in regard to established principles of law it is not improper for him to al-

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lude to exceptions to the rule, or to notice such circumstances as would prevent its operation.

But we are of opinion that the qualification in this case was proper and necessary, in order to fairly submit the case to the jury. If we admit that the location of the plaintiffs was sufficient to make a valid claim to all the ledges outcropping at that place, still, if after the location they went to work on one ledge, and the defendants, with their knowledge, went to work on *another* ledge alongside of them, and plaintiffs, instead of objecting, encouraged the defendants to go on by saying they thought there would be no interference between the two companies, that they were on different ledges, this might be held as either evidence of abandonment of the ledge worked by defendants, or it might be held as an estoppel against plaintiffs. There certainly was some such evidence as this. We therefore think the qualification was proper.

The next error complained of is that the court gave the third instruction as follows: "If the outcroppings of two quartz ledges be mingled, confused and blended, upon or near the surface of the ground, and a person or persons — supposing these croppings belong to and be connected with a single ledge or lode — locate claims thereon as upon a single ledge, they do not thereby become entitled to claim both ledges; they must make their election within a reasonable time which of said ledges they will take by virtue of their location. If they should fail within a reasonable time to elect and choose which of said ledges they would take by virtue of their location, and other persons should, in good faith, subsequently locate claims upon one of said ledges, and go into the possession thereof, the right of election of such prior locators would be taken away as against such subsequent locators, and they would be confined to their claims upon the other of two ledges."

This instruction seems to be the one covering the most important ground in this whole controversy. The evidence shows (if we can consider it as before us) that the plaintiffs located aclaim on certain croppings extending eight hundredfeet each way, northerly and southerly, from where the notice was posted. The notice is not to be found in the transcript, and we can not tell what its language is. Whether its terms

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are sufficiently broad to include several ledges, or only one, we can not tell.

Neither are there any mining laws set out in the transcript whereby we might determine whether a company locating a claim on a hillside would be entitled to locate only one ledge, or might be entitled to locate all on the hillside from top to bottom, or from one base to the other of the hill. We are left in the dark as to many things which might be important in determining the propriety of this instruction.

We do know, however, that whilst the plaintiffs were the first locators (in January, 1860), the defendants located shortly after on their ledge, and there appeared to be no objection by the plaintiffs, but an opinion was expressed by one of the locators of plaintiffs' claim, and one who was actually engaged at work on it, that there was no conflict in the two claims.

This would indicate that plaintiffs tacitly admitted that if there were two distinct ledges, defendants were entitled to the one on which they were at work.

It would seem to be an admission, too, that they (plaintiffs) located but one ledge, and did not claim all ledges outcropping at the place. Under these circumstances, we are inclined strongly to the opinion that the plaintiffs were entitled to only one ledge. If so, this instruction would seem to be perfectly fair, and to present the case to the jury as it should have been presented. If there were two ledges (and the jury certainly must have so believed to find for defendants), the plaintiffs were at work on one, and the defendants on the other. The work of plaintiffs on one ledge was an election of that ledge. There was nothing in the instruction prejudicial to plaintiffs, if they only had the right to one ledge.

The third assignment of error is, that the court gave a certain instruction in regard to the possession of joint tenants and tenants in common, to the effect that the possession of one was the possession of all, except when some decisive act was done by the one in possession, amounting to an ouster of his cotenants.

Our answer to this assignment of error is, that we see nothing wrong in the instruction, and if there is anything technically wrong in the language used, we can not see how it could injuriously affect the appellants.

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The fourth assignment of error is that the court gave an instruction in these words:

"No person can claim title to mining ground under a location made by posting and recording a notice, except those whose names are in the notice, or those who claim by derivation of title under such original locators. A claim made in the name of one person does not inure to the benefit of another, simply because of an intent on the part of such other, at the time of the making the location, that it should inure to his own benefit.

"Where parties claim under a location made under the mining rules, their title can not have an inception prior to date of a notice of location in which their names, or those of their grantors, appear.

"A party in whose name a location of a mining claim is made, is presumed, *prima facie*, to assent to the same. The possession of a portion of tenants in common of a mining claim is in law the possession of their co-tenants. When a location is made in the name of certain persons, and it is desired to substitute other and different names for a portion of the original locators, this can only be done by a re-location of the claim. If such re-location be made, the names of some of the original locators and claimants being inserted in the notice of re-location, together with other and new names substituted in the place of one or more of such original locators, such re-location can be invoked as against third persons, and in behalf of such subsequent re-locators, only from the date of such re-location. The claim of those parties whose names are in the original notice, and also in the notice of re-location, would, if they continued in possession of the claim without abandonment up to the date of re-location, still hold good under their original notice, and be entitled to whatever priority of right it would give them, unless, at the time of making the re-location, they should abandon their claim under the original notice."

It will be recollected that when the plaintiffs' claim was located, three of the parties who participated in having the location made, to wit, Driscol, Peters and Higgings, instead of having their own names inserted among the locators, each selected the name of a friend living in Illinois, and had such name placed on the notice. Afterward a request was

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made of the recorder of the mining district to have the names of Driscol, Peters and Higgings substituted in place of their absent friends whose names had been used in the first place.

But counsel for appellants complains that there was no evidence of re-location introduced. We think there was some evidence on this head. But if there was none, so much the worse for him. If there was no re-location, Peters, Driscol and Higgings had no title whatever, and neither they nor those claiming under them could recover in this action. The appellants can not complain that the hypothetical case put by the court was more favorable to them than the facts of the case would justify.

We think if there was any error in this instruction it was not against appellants, but in their favor.

We are of the opinion that if Higgings, Peters and Driscol had any rights which could be asserted in this action, they date from a re-location subsequent to defendants' location.

But, say counsel for appellants, Higgings, Peters and Driscol were in actual possession of the mine from June, 1860. If they were in possession, it was a possession giving them no right of action. Their position was that of servants or em ployes of their owners.

The whole claim was held in the name of other parties. If they chose to put themselves in the position of servants, employes or representatives of Mason, Stoneking and Miles, the law will hold that whilst they occupied that position their principals and not themselves were in possession of the mine. What we have said about the last instruction quoted is equally applicable to the tenth instruction given by the court.

We can see no error in it. The eleventh and last instruction embraces the same principles laid down in the third.

As in our opinion that instruction was not erroneous, neither is there any error in the eleventh and last instruction.

The evidence as to whether there are one or two ledges we think pretty well balanced.

The preponderance seems rather to have been in favor of than against the finding of the jury. Certainly there was nothing in the evidence to justify this court or the court below in interfering with the verdict.

The judgment of the court below is affirmed. Full bench concurring.

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CHASE v. THE SAVAGE SILVER MINING CO.

(2 Nevada, 9. Supreme Court, 1866.)

[1] **Location and development contract construed.** Savage and Carmack, in 1859, located a lode claim for themselves and four others, among them the plaintiff, who knew nothing of the use of his name. Five days afterward they agreed with certain prospectors to have the claim opened to "pay," the prospectors to have a half interest. This agreement, drawn up in the names of all the locators as vendors, was signed by only two of them—the two who located the claim. These prospectors expended large sums, made costly improvements and developed a valuable mine, the plaintiff meanwhile giving no notice of his claim. *Held*, that when the location was recorded, all the persons named as locators became tenants in common, and that one could not convey or incumber the interest of another. 2. That only those who signed the contract were bound. 3. That the prospectors had no defense as against plaintiff's claim under the location. 4. That these rulings amounted to "flagrant injustice" but were compelled by "the clear rules of law."[1]

Appeal from a judgment of the District Court of the First Judicial District, the Hon. CALEB BURBANK, presiding.

The facts are stated in the opinion.

PERLEY & DELONG, JAMES F. HUBBARD and J. M. NOUGUES, for appellant.

CRITTENDEN & SUNDERLAND and HILLYER & WHITMAN, for respondent.

[2] By the Court, LEWIS, C. J. BROSNAN, J., concurring.

This action was brought to recover an interest of sixty-six

[1] We consider the expression used by the court in this instance as to the injustice worked by their decision as the most unfortunate to be found among the thousands of cases examined in the preparation of this series. If their decision worked *manifest injustice*, why did they not decide for the other party? The "clear rules of law" never work "manifest injustice." They may work hardship, but that is a different thing. The real merits of the case, involving estoppel, laches and the want of plaintiff's necessary consent to the original location, are not touched upon.

[2] A rehearing was afterward granted and the case compromised before opinion thereon, so that the decision printed never became law: 2 Nev., original Ed., 10.

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and two thirds feet in the Savage silver mining ground, of which plaintiff claims he is unlawfully deprived by the defendant.

The established facts material to the issue are substantially as follows: On the fourth day of July, A. D. 1859, L. C. Savage and H. Carmack located the ledge now claimed by the defendant, for themselves and four others, among whom was the plaintiff. At the time of such location the plaintiff was residing in the State of California, and knew nothing of the location. On the ninth day of July, five days after the limits of the claim were defined, and the notice of location was recorded, a contract was drawn up in form between R. Crall, C. C. Chase, H. Carmack, W. Sturdevant, L. C. Savage and A. O. Savage, the locators, as parties of the first part, and J. McFadden, W. W. Caperton, J. B. Endicott, Samuel Baird, Elisha McCurdy and —— Hall, as parties of the second part, by the terms of which the parties of the second part agreed to prospect the mining location above referred to "until they struck pay dirt," and in consideration thereof, one half of the entire claim was conveyed to them.

This instrument, though drawn up in form for execution by all the parties, was only signed by L. C. Savage and H. Carmack, on the one side, and W. W. Caperton and J. McFadden on the other. There is not a syllable in the contract from which it can be inferred that the parties who signed it intended to act for or as the agents of the others; but as it is presented to us it appears to be an instrument incompletely executed, being signed only by four out of twelve who are named as parties to it. The plaintiff, Chase, was not informed of his interest in the claim until a month or two after its location and the execution of the contract above referred to. In November following he came to Nevada, and then, for the first time, he was shown the contract.

He at once declared to Mr. Savage, who showed it to him, that his name was not signed to the contract, and that he did not consider himself bound by it. Savage replied that he did not suppose he was.

At that time several ineffectual efforts were made by Savage and Chase to find the prospectors, but the plaintiff returned to California without having seen any of them. Some work had been done on the claim by them at that time, but

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they did not appear to have been at work whilst the plaintiff was there in November.

The interest of each locator consisted of one hundred and thirty-three and a third feet. In December, A. D. 1859, the plaintiff conveyed away one half of his interest, which, if he is not holden upon the contract entered into by Savage and Carmack, leaves about sixty-six feet to which he is still entitled, and to recover which this action is brought.

The prospectors, Baird and his associates, treating the contract as a conveyance *in presenti* to them of one half of the entire ground, conveyed their respective interests to persons from whom the defendant claims title and the right of possession.

Before the bringing of this action the mine had been developed by the defendant at a vast expense, and valuable and costly improvements had been placed upon the ground, whilst the plaintiff remained quiet and gave no notice of his claim. Upon this state of facts it is urged, on behalf of the defendant, that Savage and Carmack, in executing the contract, acted as the agents of the plaintiff, Chase, and that he was therefore bound by it; that he could not accept his interest in the mine and repudiate the contract made for the purpose of developing it; and that in adopting the acts of his agents in the location, he also adopted their subsequent acts with respect to the development and working of it; for it is said a principal on whose behalf an unauthorized agent assumes to act, can not ratify a part of the transaction without ratifying the whole.

Adopting this view of the case, the court below, among many other instructions bearing upon the same point, charged the jury as follows: "If you find that L. C. Savage made the location for the plaintiff, and then made the contract in good faith toward the plaintiff, and that the knowledge of the location and of the contract came to him at the same time, then the adoption of the location would be the adoption of the contract."

Whether this instruction would be proper, if Savage or Carmack had assumed to act as the agent of Chase in executing the prospecting contract, as they did in locating the ground, need not be determined in this case, for there is nothing either in the contract itself or the evidence offered at the trial, from

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which it can be inferred that they even intended to act for him in executing it. So the argument of counsel for respondent rests upon a false premise in that respect, and the conclusion must necessarily be incorrect. If Savage had signed the contract for Chase as his agent, or if there was anything in the contract itself by which it might appear that it was intended to bind him, there might be some ground for claiming that he is holden upon it. Nothing of the kind, however, appears. It is simply a contract in form between the parties, and signed only by four of the number for themselves. There is nothing in the contract by which we can even presume that Savage or Carmack had any intention whatever of acting for the plaintiff. But if it be admitted that they did in fact so intend, that would not be sufficient without the legal steps being taken to accomplish their object. As stated by Justice Bronson, in *Townsend* v. *Corning*, 23 Wend. 441, "It is not enough that a man intends to do a legal act, unless he uses the legal means for accomplishing his object."

So in this case Savage and Carmack may have intended to act as the agents of the plaintiff in the execution of the contract, but as they have not manifested that intention in legal form, it is of no consequence. Indeed, it is a well established rule that every written contract made by an agent, in order to be binding upon his principal, must purport on its face to be made by the principal, or the intent to bind him must appear in the instrument itself: *Williams* v. *Christie*, 10 How. Pr. 12; *Staunton* v. *Camp*, 4 Barb. 274; *Townsend* v. *Corning*, 23 Wend. 435; *Evans* v. *Wells*, 22 Wend. 324; *Townsend* v. *Hubbard*, 4 Hill, 351; *McDonald* v. *Bear River Co.*, 13 Cal. 235. In the case of *Williams* v. *Christie*, above cited, the contract was one for the sale of certain real property in New York, and purported to be made between Jane Christie, Stephen L. Preston and Margaret Ann, his wife, Levi H. Truex and Mary Jane, his wife, of the first part, and the plaintiff, Williams, of the second part. The wives of Preston and Truex were present when the contract was drawn up, but the instrument was only signed by Jane Christie, Preston, Truex and Williams, and the Supreme Court of New York held the contract utterly void as to those who had not signed it. In delivering the opinion, Justice Bronson says:

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"The signatures of the husbands of Mrs. Preston and Mrs. Truex do not purport to have been made in behalf of or as agents of their wives. There is nothing on the face of the agreement which intimates that they are agents, or that they assumed to act as agents for their wives in signing it. We consider the doctrine well settled that every written contract made by an agent, in order to be binding upon his principal, must purport on its face to be made by the principal, and must be executed in his name and not in the name of his agent." The instrument in this case was not under seal, and therefore it was not necessary that the name of the principal should be signed to it; but it is indispensable that it should appear upon its face that it was intended to be made for the principal. After the notices of location were posted and recorded, and the limits of the claim defined, the locators became tenants in common of the ground. They stood in that character at the time the contract was executed by Savage and Carmack. As such tenants in common they had a right to dispose of their own interests, but they could in no way dispose of or incumber the interests of their co-tenants.

The contract, therefore, if it be binding upon any one, can only be upon those who signed it. If we should feel disposed to disregard the rules of law, that to make a written contract by an agent binding upon his principal it must appear upon its face to have been the intention to bind him, and that one tenant in common can not convey or incumber the interest of his co-tenant, and be governed solely by the intention of Savage and Carmack, we could come to no different conclusions; for there is nothing in the record showing that they ever intended to act for the absent locators; but, on the contrary, it seems to have been the intention to get Chase to execute the contract for himself; for Savage says in his testimony that he did not expect he was bound by it, unless the locators got him to sign it or he executed a deed for one half of the ground. The instrument itself is in form the contract of all the parties, and had it been signed by all would probably have conveyed one half the ground to the prospectors.

Until it was so signed, however, it was incomplete, and the prospectors could not have been compelled to perform their part of it until signed by all the locators. If they went on

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and did the work under it before it was completely executed, they did it at their own risk, and can not now come in and claim the same rights under it which they could if signed by all the parties. Had all the locators in fact entered into a contract of this kind, and merely neglected to sign it without intending to abandon it, and they permitted the prospectors to do the work, as if it were completely executed, there is, perhaps, no doubt but a specific performance would be decreed upon a proper application to a court of equity; but surely no court would enter such a decree against one who had in no way entered into such contract, either verbally or by writing. If we are correct in the conclusion that the instrument was the contract of Savage and Carmack only, or that they did not intend to act as the agents of the plaintiff, there could be no ratification by Chase. There was nothing for him to ratify. There had been no attempt to act for him in the execution of the contract. So the proposition that the plaintiff could not adopt the location without also adopting the contract, or rather that he could not accept the benefit and repudiate the burdens, is answered by the statement of the fact that there was no attempt to make the interest of Chase subject to the contract, or to impose any burden upon it, but it was left for him to do it himself if he chose to do so. And there is no law to sanction the position that he could not adopt the acts of Savage when he acted as his agent in acquiring certain property, without also adopting other transactions with respect to that property, in which he merely acted for himself. Suppose Savage and Carmack had mortgaged their respective interests in the claim, for the purpose of obtaining money to develop it, instead of entering into this contract, would it be claimed that the plaintiff could not accept his interest in the claim without assuming a certain proportion of the mortgage? Could the mortgagee in such case claim that his mortgage covered Chase's interest as well as the mortgagor's? Most certainly not. And yet we can see no difference upon principle between that case and the one at bar.

If he could accept the location in the hypothetical case without assuming the burden of the mortgage, why can he not, in this case, accept his interest in the location without adopting a contract which did not purport in any way to bind

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him or his interest? True, by its terms one half of the entire claim was conveyed to the prospectors, but until executed by all the parties to it, it was either no contract at all, or only the contract of those who signed it.

It was not the intention of Savage and Carmack to convey one half of the entire claim themselves, but only of *their interest* in it. The prospectors must have known that fact. The contract itself was evidence of it, and that would appear to be the understanding of all the parties. When signed by only two of the parties, therefore, as stated before, the contract was either a nullity, or it was binding upon those only who signed it. If all those who were to sign it failed to do so, the prospectors, by going on with the work under it, could not increase the liability of those who did sign it. The contract, then, stands precisely the same as if Savage and Carmack had in terms conveyed simply one half of their interest in the claim. With this view of the case, it is obvious that it was no part of the plaintiff's duty to give the prospectors notice that he was not holden upon the contract, for they had no reason to suppose that he was.

We have examined this case with a sincere desire to find some authority for affirming the judgment of the court below, for we look upon it as one of those cases where the application of the inflexible rules of law operates as a flagrant injustice, which we are loth to sanction.

We have, however, no option but to follow the clear rules of law; for to declare, not to make the law, is the province of the courts. It is a deplorable fact, which we fully realize, that these stale claims, conjured up from the lawless irregularities of a period when legal forms were disregarded and physical force was the only law recognized by society, have been a blight upon the prosperity of the great dominant interest of this State.

The rules of the common law, though founded in reason and sanctioned by the wisdom of centuries, afford it but a feeble and inadequate protection from the claims of those who shirk the burden and the labor, and emerge only from obscurity to claim the fruit produced by the industry and perseverance of others.

The State should, therefore, protect her mining interests

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by such wholesome and just legislation as will, in the future, relieve it from the evils which have beset it in the past. Other instructions were given which were erroneous, but we do not deem it necessary to pass upon them, as the principles announced in this opinion sufficiently dispose of them.

Judgment reversed and a new trial ordered.

BEATTY, J., having acted as counsel in this case, did not participate in the decision.

AARON ZECKENDORF AND LOUIS ZECKENDORF V. JOHN S. HUTCHISON.

(1 New Mexico, 476. Supreme Court, 1871.)

Purchaser may perfect title. When a discoverer conveys a claim to a third party before such discoverer has completed his location, the purchaser is bound to do the acts required to complete the location within the same time to which his grantor was limited.

Acts of location must be stated. The conditions precedent to the acquiring of a title to mineral claims, upon bill for injunction to restrain trespass thereon, must be stated; they will not be presumed.

Discovery shaft required on each claim. Where a number of persons take up 1,500 feet upon a lode, dividing the same into parcels held in severalty, the sinking of a shaft upon one of such several claims is not sufficient to perfect title to the entire portion so located in parcels.

Certificate not conclusive. The certificate of location required to be made by the probate judge (under the New Mexico statute), is not conclusive evidence of a compliance, by the locators, with the requirements of the law. No act done in a mere ministerial capacity can be conclusive evidence.

Appeal from the District Court for Santa Fe County. The opinion states the case.

CHARLES P. CLEVER, for the appellants.

R. H. TOMPKINS, for the appellee.

By the Court, WATERS, J.

The complainants in this case filed their bill in chancery in

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the court below, setting forth that on the fourteenth of August, 1867, the defendant, John S. Hutchison, discovered a certain vein and deposit of gold, mixed with other metals and minerals, on the south slope of the San Lazaro mountains, in the county of Santa Fe. In exhibit A, which is attached and made a part of the bill, it appears that John S. Hutchison, Michael Ward, Paufino Casero, Dolores Chaves, Bernardo Fraise, James Patterson, and Juan Chaves, to use their own language, "located as a mining claim one thousand five hundred feet, horizontal measurement," upon said lode, and "known as the Santa Fe Candelaria Lode."

It also appears that a shaft was sunk upon the discovery claim. Said exhibit further shows that said claim of one thousand five hundred feet was divided and held in severalty by the parties above stated, and each claim is separately described and assigned to the respective parties. The bill further shows that on the twenty-seventh of January, 1868, Bernardo Fraise sold to the complainants his claim on said lode, for the sum of one thousand dollars, and that the complainants were induced to purchase this claim from said Bernardo Fraise, on the certain representations made to them by the defendantin this suit; and that afterward said John S. Hutchison entered upon claim purchased by complainants of said Bernardo Fraise, and was carrying therefrom large quantities of mineral, to the value of about five thousand dollars. Whereupon complainants prayed the court to enjoin said John S. Hutchison and his confederates from taking from said claims any more gold-bearing quartz until the title to the same be established in a suit then pending in the District Court of the First Judicial District. To this bill defendant demurred. The demurrer was sustained and the bill dismissed.

The only question then to be considered in this case is, whether the court below erred in sustaining the demurrer. It will be remembered that the location of the claim in question was made and approved by the probate judge of Santa Fe county, on the seventeenth day of August, 1867, from which time Bernardo Fraise had twelve months in which to perfect his title, by sinking a shaft of not less than twenty feet in depth, as provided in section 4, Rev. Stat., p. 728.

The sale of the claim to complainants, and on which they rely for title, by reference to exhibit D will be found to have

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been made on the twenty-seventh day of January, 1868, a little over five months from the date of the location of the claim. Section 5, on the same page of the statute, provides "that claims or locations as defined in the first, second, third, and fourth sections of the same act, may be sold and transferred by the owner or owners thereof, by deeds of conveyance, in the same manner as is now provided by law for the conveyance of real estate," etc. Under this section there can be no doubt as to the right of the owner of a claim to sell the same by deed when he shall have complied with the requirements of those sections. Until those sections are complied with, he has only what may be termed a contingent claim to dispose of, and if he sells the same the purchaser is required, before his claim can become valid, to comply with the requirements of said section within the period of one year, commencing from the time the claim was located, and if he fails to comply, his right to the claim ceases to exist at the expiration of the year.

The counsel for complainants argue that the bill is good, and that this court will presume that all the requirements of the statute have been complied with on the part of Bernardo Fraise, at the time he sold the claim in question to complainants. This is not law, and this court, in the exercise of its equity jurisdiction, will not undertake to presume the performance of the statutory requirements which are conditions precedent to the acquiring of a title to mineral claims. For instance, if a man files a bill as executor and does not state in it that he had proved the will in the proper court, the bill would be held bad on demurrer. The proving of the will is a condition precedent, and will not be presumed by courts to have been complied with; so also, the executor of a deceased person has an interest in all the personal property of his testate; but until he has proved the will he has no right to assert his right in a court of justice. So it is in every case where certain statutory requirements are conditions precedent to the full exercise of the power sought to be enforced or the thing done.

The bill should state that all the requirements of the law necessary to a complete title had been complied with. The mere statement of the location and sale to complainants by deed

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is not sufficient; but it is insisted that there is equity in this bill, and it must therefore be held good, and that we shall enforce equity over the well-established rules of practice by which courts of equity are governed. We do not see anything in this bill that will justify a departure from the usual mode of obtaining equitable relief, neither do we feel authorized in establishing a mode of practice hitherto unknown to the courts of equity.

Here we might stop, but as some other questions were raised in the course of the argument by counsel, we will notice them briefly. The first was, that the parties who located these one thousand five hundred feet on the lode was a company, and as such but one shaft was necessary to be sunk on the entire one thousand five hundred feet. The bill does not disclose the fact that they were a company. On the contrary, the bill proper and the exhibits attached thereto, and by the complainants made a part of the bill, prove conclusively that the various claims were held in severalty by the respective claimants. The deed itself, executed by Bernardo Fraise to complainants, on its face denies the existence of a company or partnership of any kind; for it purports to sell the very claims by number assigned to Bernardo Fraise, at the time of the location and by him held in his own right. But counsel refers to the certificate of location by the probate judge of Santa Fe county to prove that this was one claim, and that the requirements of the law had been complied with, and that such certificate was not only *prima facie*, but conclusive evidence of a full compliance with the law. The probate judge, in the discharge of this duty conferred upon him by statute, acts only in a ministerial capacity, and can not exceed the powers given him by law. Neither is his certificate conclusive evidence of a full compliance with the law. To hold that the acts of an officer acting under a positive statute in a ministerial capacity shall be conclusive evidence is against natural justice. It is not in the power of the legislature under our form of government to make it conclusive as to matters which are essential to the performance of any statutory provision. This principle of law is well settled.

The questions of the representations made by defendant to complainants of the condition of the claim in question, and the

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entering on the claim by defendant, have nothing to do with the question before us, and are not considered.

Entertaining these views, our conclusion is that the bill is defective in not stating that all the requirements of the law had been complied with, either on the part of Bernardo Fraise or complainants, and the demurrer was properly sustained, and that the judgment of the court below should be affirmed.

The other judges concur.

SULLIVAN ET AL. v. HENSE ET AL.

(2 Colorado, 424. Supreme Court, 1874.)

Location by miners before passage of statute. Before any law was enacted by the territorial assembly, regulating the manner of locating and conveying mining claims on the public domain, that matter was regulated solely by rules or by-laws made by the inhabitants of the district in which the claim was situate, or in the absence of such rules and by-laws, by the local customs and usages of the district.

Application of the rule. In the year 1860, a valid location of a mining claim on the public domain could be made only according to the rules, usages and customs of miners in the district where such claim was situate.

Judicial notice can not be taken of the rules, usages and customs of mining districts, and they should be proved at the trial like any other fact, by the best evidence that can be obtained respecting them.

[1] **Plaintiff must prove location.** Plaintiffs in ejectment, who seek to recover a mining claim upon their paper title, there being nothing to show that they or their grantors were ever in possession, must prove a valid location of the claim according to the rules of the district prevailing at the time such location was made.

Execution of deeds to be proved. A deed for a mining claim executed and recorded in the district where the claim is situate, before any act was passed by the territorial assembly relating to such instruments, can not be given in evidence without proof that it was executed by the grantor:

1st. According to the local rules and customs of the district; or

2d. By the subscribing witnesses (if any), as provided in the 15th section of the chapter relating to conveyances.

Record or office copy of deed or power of attorney. A deed or power of attorney can not be proved by the record thereof, or by a copy taken from the record, except in the manner prescribed by section 19 of the chapter relating to conveyances.

The preliminary affidavit mentioned in that section should be made by all of

[1] *Pralus* v. *Jefferson Co.*, 34 Cal. 558; *Post* QUIET TITLE.

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the persons, plaintiffs or defendants, by whom the record of an instrument, or the copy thereof, is offered in evidence.

Record or office copy of certificate of location. A certificate of location of a mining claim may be proved by the record or by a transcript from the record under another statute without the affidavit of the party desiring to use it as to the possession of the original certificate.

As to length of claims by district record. In the absence of better evidence, the rule or custom of a mining district as to the length of claims located in the district may be proved by the uniform usage of recording a certain number of feet.

Appeal from District Court, Gilpin County.

Ejectment, by John H. Hense and Charles C. Welsh against Dennis Sullivan, Theodore E. Wheeler and the Central Go'd Mining Company, to recover claim No. 3 west of discovery claim on the Borton lode in Illinois Central District, being in length 100 feet and in width fifty feet. The plaintiffs claimed the right to occupy and possess the premises under the local laws of Illinois Central Mining District, by virtue of a purchase made by them. The defendants pleaded not guilty, and the trial was had at the April term, 1873, of the district court. The plaintiffs gave evidence tending to prove that the Borton lode was discovered in the year 1860, and that a shaft was sunk on the discovery claim in that year. William D. Arnett, the only witness who seemed to have a knowledge of the fact, testified that in the year 1860, and up to the latter part of September or the first or middle of October, 1861, he owned and occupied the surface of claim No. 3 west as a "patch claim," and that no other person was in possession thereof; the plaintiffs also offered parol evidence as to the rule or custom of the district in the year 1860, relating to the length of discovery claims, which was said to be 200 feet. It was also in evidence that the rules and regulations of the district were at one time in the office of the county recorder, and that they could not be found there at the time of trial. The plaintiffs also gave in evidence a copy of a certificate of location taken from the records of the district, as follows:

"SAMUEL WILSON,
Recorded November 2, 1860.

The undersigned claims 100 feet by 50 on the Borton lode, known and described as claim No. 3 west of the discovery.

SAMUEL WILSON.

November 3, 1860."

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Also, copy of a warranty deed from Samuel Wilson to John B. Goldsberry, conveying claim No. 3 west of the discovery on the Borton lode, dated October 6, 1861, witnessed by James Tolman and Ben Short; also, copy of a power of attorney from John B. Goldsberry to Henry Chatillon, dated September 21, 1866; also, warranty deed from John B. Goldsberry, by Henry Chatillon, his attorney in fact, to John H. Hense, conveying claim No. 3 west from the discovery claim on the Borton lode dated December 21, 1866; also, quitclaim deed from John H. Hense to Charles C. Welsh, conveying undivided one half of claim No. 3 west on the Borton lode. Defendants objected to the certificate of location and to the several deeds, on the ground that it was not shown that they were signed by the persons whose names were attached thereto, and also upon the ground that the affidavit as to the possession of the original instruments was made by one of the plaintiffs only. It was also objected that no right was shown in Wilson to make the location or to convey. The affidavit as to the possession of the original certificate of location and of the several deeds of conveyance, was as follows:

"John H. Hense, being first duly sworn, on his oath says: That he is one of the plaintiffs in the above entitled cause; that he desires to use, on the trial of this cause, a certified copy of the record of a certain pre-emption certificate of Samuel Wilson for No. 3 west Borton lode in Illinois Central Mining District, in said county and Territory, and also a certified copy of the records of a certain deed for the conveyance of said claim No. 3, from said Samuel Wilson to John B. Goldsberry; also, a certified copy of the record of a certain power of attorney from said Goldsberry to one Henry Chatillon, being a general power to sell and convey all said Goldsberry's interest in and to any mining claim or claims in said Territory of Colorado, dated 1st September, 1866, recorded in Gilpin county aforesaid, October 9, 1866, book 30, page 411. That the originals of said papers, and each of them, are not in his possession or power to produce, and they have not been lost or destroyed by any fault of this affiant."

The defendants gave evidence tending to prove that the claim in controversy was upon the Rhoderic Dhu lode located in the year 1861; they also put in evidence several

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conveyances of property on the Arnett lode, but as this evidence is not referred to in the opinion, it is not necessary to set it out; the defendants also offered book two, of the records of the Illinois Central Mining District, for the purpose of showing the length of discovery claims located in that district, and this, upon plaintiffs' objection, was excluded by the court. Upon request of the plaintiffs the court charged as follows:

1st. The court instructs the jury that if they believe from the evidence that the Borton lode was discovered and taken up in 1860, and duly recorded in accordance with the customs of miners when said lode was discovered, the said lode or vein was not open to exploration or occupation, and no one could make a second legal and valid discovery on the said Borton vein or lode after the same had been so recorded and taken up.

2d. The court instructs the jury that when two crevices are discovered at a distance from each other, and are known by different names, and it appears that the two are one and the same lode, the persons having recorded on the first discovered lode are the legal owners.

3d. The court instructs the jury that if they believe from the evidence that the Borton lode was discovered in 1860, and No. 3, west, was recorded by Samuel Wilson, and that the plaintiffs derived a title from Samuel Wilson and his grantees, and that the defendants worked and occupied said No. 3 at the time of the commencement of this action, claiming it as the Rhoderic Dhu lode, and the jury believe, from the evidence, that the Borton and the Rhoderic Dhu lodes are one and the same, then the plaintiffs are entitled to recover in this action, unless the jury believe, from the evidence, that the Rhoderic Dhu lode was discovered before the Borton was.

Upon request of defendants, the court charged as follows:

1st. The plaintiffs must recover upon the strength of their own title and not upon the weakness of the defendants'.

2d. A mining claim in the year 1860 could only be acquired by occupation and possession of the same, or by compliance with the local laws and customs of the district, if there were any, where the same was situated. If claimed by occupancy and possession, the possession must have been defined and marked by monuments and marks. And if claimed under the

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local rules and customs of the district, it must be shown what those rules and customs were, and that the person so claiming complied with the same.

The court refused to give the following instruction, asked by the defendants:

2d. The plaintiffs, in order to recover, must prove to your satisfaction what were the rules, customs and regulations of Illinois Central Mining District, if there were any, and that the grantor, through whom they claim to have acquired a title to the premises in dispute, complied with such rules, regulations and customs, and if they have failed to do so, you must find the defendants not guilty.

The jury found the defendants guilty, and that plaintiffs were the owners of the claim, and there was judgment on the verdict.

Mr. Justice WELLS did not sit at the hearing.

HUGH BUTLER, for appellants.

WILLARD TELLER and G. B. REED, for appellees.

HALLETT, C. J.

The title upon which appellees obtained judgment in the court below, originated in a location made by one Samuel Wilson on the 3d day of November, 1860. In that year a shaft was sunk on the discovery claim, and some persons occupied the surface of the claim in dispute as "patch diggings," but it does not appear that anything was done upon this portion of the lode. On the contrary, Arnett, a witness for appellees, who worked the "patch claim," and was therefore well acquainted with the property, testifies that no one other than himself was in possession up to the latter part of September, or first or middle part of October, 1861, and his testimony is not contradicted. Wilson conveyed to Goldsberry, October 5, 1861, and the latter to Hense, one of the plaintiffs below, December 21, 1866. Neither appellees nor their grantors were ever in possession of the lode, and the judgment rests upon the paper title set out in the bill of exceptions. It will be observed

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that the claim was taken and recorded by Wilson, and that the conveyance to Goldsberry was made before any law regulating such matters was enacted by the territorial assembly. The manner of locating a mining claim upon the public domain, and of conveying title to the same, was then regulated by rules or by-laws made by the inhabitants of the district in which the claim was situated, or in the absence of such rules and by-laws, by the local customs and usages of the district. To give effect to such rules, usages and customs, the legislative assembly, by an act approved November 7, 1861 (1 Sess. 168), enacted that all rights of occupancy, possession and enjoyment of any tract or portion of the public domain acquired before the passage of that act, should be ascertained, adjudged and determined by the local law of the district or precinct in which such tract was situated as it existed on the day when such rights were acquired, and if there was no such local law, then by the common custom prevailing in respect to such property; and this provision was retained in the Revised Statutes of 1868 (531), and is still of force. The validity and force of such rules, usages and customs have also been recognized by Congress (13 Statutes at Large, 441; 14 Id. 251; 17 Id. 91), and by the Supreme Court (*Sparrow* v. *Strong*, 3 Wall. 97), by which they are established, without doubt or question. We may therefore assume that a valid location of the claim in dispute could have been made in the year 1860, only according to the rules, usages and customs of miners in Illinois Central district, where it is situated, prevailing at that time, and it is important to determine in what manner such rules, usages and customs are to be ascertained. To say that the court is advised as to the nature and extent of such regulations is contrary to the fact, and therefore they can not be the subject of judicial notice.

In California provision is made by statute for introducing proof of such regulations at the trial (Code of Prac., § 748), and so the practice has been with us from the earliest time. No other course can be pursued, and no good reason is perceived for adopting a different rule. That it may work hardship, in cases where the proof is difficult or impossible to obtain, is readily understood, but as such proof lies at the foundation of the title, it is impossible to dispense with it. What

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this evidence shall be must depend very much upon the circumstances of the case, and it would be difficult to frame a general rule upon the subject. It is well known that in most of the mining districts, rules governing the location and transfer of claims were reduced to writing, and preserved in the records of the district, which were afterward deposited in the office of the county clerk and recorder. In some instances the regulations were printed in pamphlet form, and copies of such pamphlets may be found; in others no record of them remains, and resort must be had to the testimony of living witnesses, or to other evidence to establish them.

Whenever a copy of the rules can be had, no other evidence of them should be received, for in this, as in all other cases where a fact is to be proved, the law demands reasonable diligence in procuring the best evidence at command. An early statute required that the records, laws and proceedings of mining districts should be deposited in the office of the county clerk (1 Sess. 167), and for the purpose of introducing secondary evidence it may be sufficient in the first instance to show that the local laws of the district are not of record in that office. Such proof was made by appellees upon the trial below, and as it was not contended that a copy of the rules of the district was accessible, oral or other evidence tending to explain or establish the fact was clearly admissible. There was, however, but little evidence offered upon the trial respecting the rules and customs of Illinois Central district, and that was directed to one point—the length of the discovery claim. No effort was made to show what was necessary to be done in locating a claim in that district, or that anything was done according to local regulations. It may have been necessary to sink a shaft on the claim, or to define the location by monuments or in some other way. We can not assume that a certificate of location, on the records of the district, was all that was necessary to make a valid title to a mining claim or indeed that the certificate itself was made according to the local rules of the district. The evidence should show the essential features of a good location in that district, and that Wilson made such a location of the claim in dispute. So, also, the deed from Wilson to Goldsberry, dated October 5, 1861, was not shown to

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have been executed according to the rules and customs of the district, nor was there any proof of the execution of it. In the 15th section of the chapter relating to conveyances (Rev. Stat. 109), provision is made for proving the execution of a deed attested, as was this one, by subscribing witnesses, and appellees could have pursued that method if they desired to avoid the necessity of proving the rules and customs of the district; but it was necessary to prove the execution of the deed in some way. It is true that the statute declares that the records of mining districts shall be taken as evidence in the courts (Rev. Stat. 466), but this can not be extended beyond records made according to the local rules and customs of the district. It would be absurd to suppose that the legislature intended to give validity to every instrument which may have been placed upon the records contrary to the local laws and customs of the district, for in that way those laws and customs which the legislature has always sought to perpetuate and enforce would be ignored and nullified. Therefore, it was not enough to show that the deed from Wilson to Goldsberry was found upon the records of Illinois Central district, but proof of the local rules and customs regulating the transfer of mining claims should have been offered in order that it might appear that the deed was executed conformably to those rules and customs; or, failing in that, proof of execution should have been made under section 15 of the chapter relating to conveyances. The 19th section of that chapter declares the law upon this point so fully and clearly that no doubt can be entertained respecting it.

Passing to the question of the proof by office copy of the certificate of location, and the several deeds of conveyance, it will be necessary to refer to the statutes bearing upon the point. The act above mentioned (1 Sess. 167) by which the records, laws and proceedings of mining districts are rendered admissible as evidence, does not require preliminary proof of the existence or loss of the instrument recorded, and probably under that act the record of a deed or other instrument, which was by law admitted to the record, might have been used without laying a foundation for secondary evidence. In the year 1868 another rule was prescribed upon the same subject, in section 19 of the chapter concerning conveyances

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(Rev. Stat. 112), and although the earlier act was substantially retained in the Revised Statutes of that year (466), we think that the latter act should control.

The act of 1861 may be regarded as having effect from the date of its enactment, and probably the legislative assembly of 1868 did not weigh its provisions as carefully as those which were newly prepared and adopted at that session. In the revision, these acts were approved on the same day, but it is fair to presume that the one which was last prepared contains the best expression of the will of the legislature, and for this reason effect should be given to the act of 1868. That act requires that the party desiring to use the record of any deed, bond, agreement or power of attorney, or a transcript thereof, shall make affidavit that the original deed or other instrument is not in his possession or power to produce, and thereupon the record or transcript may be given in evidence with the same effect as the original deed or other instrument. That the oath must be made by all of the persons seeking to use the record or transcript is manifest from the language of the act and the fact to be stated. Generally, the word "party," as used in the statute, will comprehend all who appear on one side of the case, either as plaintiffs or defendants, the evidence being available to all who are in that way associated, and all of them being desirous to use it. In the case at bar, it is impossible to apply the word "party," in the sense in which it is used in the statute, to either of the appellees, inasmuch as there can be but one party plaintiff in that sense, and they together constitute the party who desired to use the secondary evidence. The purpose of the law is to compel the production of the deed or other instrument, if those who desire to use it have the possession or control of it, and this purpose can only be effected by requiring all of them to testify as to the fact. The affidavit of Hense did not, and could not disclose whether the deeds and power of attorney, copies of which appellees gave in evidence, were in possession or under the control of Welsh, and if they were in the possession of the latter, the law certainly required that they should be produced.

The statute demands nothing more than the affidavits of all persons, plaintiff or defendant, as the case may be, as to their

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ability to produce the original document, which is a great modification of the old rule, and there can be no great hardship in observing its provisions. The affidavit of Hense was not of itself a sufficient foundation for secondary evidence, it being equally necessary that his co-plaintiff should testify in that behalf. The certificate of location is not, however, mentioned in the act of 1868, and as the record of it appears to be within the terms of the act of 1861, no affidavit was required preliminary to its introduction. Doubtless it was necessary to show that the certificate was made according to the rules and customs of the mining district, but the absence of the original document was not matter for objection.

Upon the trial below, appellants proposed to show the rule or custom of Illinois Central district, as to the length of discovery claims, by the record of claims in the district. In the absence of the rule itself, it may be doubted whether better evidence could have been found. If, at and before the discovery and location of the Borton lode, the claims recorded in that district were uniformly of a certain number of feet, that circumstance would be evidence tending to prove that the rule of the district prescribed that length of claim. Such evidence would be far more satisfactory than that of a living witness whose memory might be at fault, and therefore it should have been received. Objections to evidence were made, upon which much time might be expended without advantage to the parties in this litigation. Enough has been said to determine the substantial questions presented in this record, and counsel should not ask more.

The judgment of the district court is reversed and the cause is remanded for a new trial.

Reversed.

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HOLLAND ET AL. v. MOUNT AUBURN GOLD QUARTZ MINING CO.

(53 California, 149. Supreme Court, 1878.)

Insufficient marking of boundaries. The posting of a notice of claim on a tree at each end of a claim is not a compliance with § 2324, U. S. Revised Statutes, requiring a location to be distinctly marked upon the ground so that its boundaries can be readily traced.

Appeal from the District Court of the Fourteenth Judicial District, Nevada County.

Ejectment for a quartz mining claim of fifteen hundred feet long by six hundred feet wide. The defendant had been in possession of the claim for several years, when in August, 1876, the plaintiffs attempted to relocate it, upon the assumption that the defendant had forfeited its interest in the claim by failing to do the work required by the act of May 10, 1872, which requires work of the value of ten dollars for each one hundred feet, to be done annually. The plaintiffs went upon the ground and posted the following notice upon a tree at each end of the claim:

"Notice is hereby given that we, the undersigned, have this day located and claimed fifteen hundred (1,500) feet on this quartz ledge, commencing at a white oak tree standing about fifty feet northeast of G. W. Ragon's house, and running thence along the ledge in a southerly course for said distance to a black oak tree which is about two feet in diameter, with top broken off and dead on west side, and standing in an inclosure, Clevelands. We also locate and claim all dips, spurs, angles and variations of said ledge for three hundred (300) feet on each side of the ledge. The same to be known as the Como Mine. Nevada Mining District, Nevada County, California.

"EDWIN TILLEY,
"August 25th, 1876. "J. L. HOLLAND."

No other monuments or marks were provided by the plaintiff until after the commencement of the action, when he had

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the claim regularly surveyed and the boundary lines duly marked, but in the meantime the defendant had resumed work upon the claim. Judgment was rendered for the plaintiff, and the defendant appealed, a new trial having been denied.

JOHNSON & CROSS, for appellant.

W. D. LONG and GEORGE S. HUFF, for respondents.

BY THE COURT.

The defendant was in possession of the mining ground prior to the dates when the plaintiffs attempted to locate it under the provisions of the act of Congress of May 10, 1872.

Before the commencement of this action the location of plaintiffs was not *distinctly marked on the ground so that its boundaries could be readily traced*, as required by the act: Rev. Stats. U. S. Sec. 2324.

Judgment and order reversed, and cause remanded for a new trial.

GELCICH v. MORIARTY ET AL.

(53 California, 217. Supreme Court, 1878.)

Definite findings, to support decree. The findings, to support decree based upon actual possession, must show that plaintiff had possession of a definite portion of the ground in controversy.

[1] **Boundaries must be marked.** Since the passage of the Mining Act of May 10, 1872, a claimant must distinctly mark his location upon the ground so that the boundaries can be readily traced.

Location notice, no marking of boundaries. A location notice placed on the center of the claim and calling for a definite length and width: *Held*, not a compliance with such act requiring the marking of boundaries.

Appeal from the District Court of the Sixteenth Judicial District, Inyo County.

The action was brought to quiet title to a mining claim situate in the Coso Mining District. Both parties located sub-

[1] *Gleeson* v. *Martin White Co.*, 9 M. R. 429; *Holland* v. *Mt. Auburn Co.*, 9 M. R. 497; *Southern Cross Co.* v. *Europa Co.*, 9 M. R. 513.

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sequent to the passage of the act of Congress of May 10, 1872. The plaintiff's location was made by placing a monument of rocks three or four feet high on the croppings of the ledge, and posting thereon the following notice:

"THE BILDERRAIN VEIN OR LODE.

"Discovered November 28, 1874.

"I, the undersigned, do hereby locate and claim fifteen hundred feet linear, together with three hundred feet on each side of this vein or lode, to be known as 'Bilderrain Lode,' situate in Coso Mining District, Inyo County, California, about half a mile west of the 'Santa Rosa' lode; for all the minerals it may contain, with all its dips, spurs and angles, commencing at this notice posted in the center of this claim, and running seven hundred and fifty feet east and seven hundred and fifty feet westerly direction along said vein or lode.

"P. G. GELCICH.

"Coso Mining District, Inyo Co., Cal., Nov. 29, 1874.

"Recorded Dec. 2, 1874."

Upon a similar monument the defendants posted a notice as follows, covering the same ground:

"KENTUCK NO. TWO—NOTICE OF MINING CLAIM.

"We, the undersigned, have this day located and claim from this monument in the mineral-bearing ledge, or lode, or deposit, (1,500) fifteen hundred feet running northeasterly by southwesterly direction, (750) seven hundred and fifty feet running southwesterly, also (750) seven hundred and fifty feet northeasterly, and (300) three hundred feet on each side, with all its dips, spurs and angles of the ledge or lode. This ledge or lode shall be known as the Kentuck No. 2 mine, located in the Coso Mining District, Inyo Co., California, Thursday, January 21st, A. D. 1875.

"B. MORIARTY,
"WM. EDWIN,
"JOHN WALTERS,
"HUGH DOUGHERTY.

"Recorded Jan. 22, 1875."

The findings of the court were thus:

"1. That the said plaintiff, by and through his agent duly authorized and employed by him, did, on the 29th day of No-

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vember, A. D. 1874, locate the claim, ground and premises in question. That he placed a monument in the center of said claim and put a notice thereon, clearly defining the extent and boundaries of the same, to wit, seven hundred and fifty (750) feet in an easterly direction from said monument and notice, and seven hundred and fifty (750) feet in a westerly direction therefrom, following the lode and vein, together with three hundred (300) feet on each side of said monument and notice, and parallel with the center line of said location. That said claim was and is known as the 'Bilderrain' vein or lode, and was vacant and unappropriated at the time.

"2. That the notice posted upon the monument in the center of said claim, as stated in the preceding finding, was duly recorded in the office of the county recorder of Inyo county, on the 2d day of December, A. D. 1874, in book B of Land, Water and Mining Claims, page 107.

"3. That at the time of the location of said mining claim and ground as before found, there was no mining district established where said claim was situated, nor were there any mining laws, rules or regulations established in that locality or vicinity, for the location, regulation or working of mining claims.

"4. That at or shortly after the location of said claim hereinbefore found, some work was done thereon by the plaintiff, through his duly authorized agent, and that plaintiff paid for the same, and also the expenses of locating said claim and recording the notice posted thereon.

"5. That on the 21st day of January, A. D. 1875, B. Moriarty, Wm. Edwin, John Walters and Hugh Dougherty, placed a monument upon said claim located by plaintiff, as hereinbefore found. That subsequently to the location of said mining claim by plaintiff, and the recording of his notice in the county recorder's office of Inyo county, the miners met and organized a mining district, in which said claim was situated, known as the Coso Mining District. That on the 22d day of January, A. D. 1875, the said Moriarty and others who undertook to locate said claim had their notice of location recorded in the mining recorder's office of said Coso Mining District, and also did some work upon said claim. That they were at the time notified of plaintiff's claim, and were, by plaintiff's agent, forbidden to do any work thereon.

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"6. That the plaintiff has always, and at all times, asserted his ownership of said claim, and as far as he could, maintained his possession and control of the same. That he has never abandoned or forfeited his ownership and right of possession thereto.

"7. That one of said defendants named in said plaintiff's complaint, to wit, Hugh Dougherty, has, since the location of said claim, died intestate, but that prior to his said death he had conveyed all of his right, title and interest to his brother, —— Dougherty, whose name has been duly substituted in the place of the said Hugh Dougherty.

"THERON REED,
"District Judge."

Judgment was rendered for the plaintiff, and the defendants appealed.

REDDY & CONKLIN, for appellants.

L. QUINT, for respondent.

BY THE COURT.

The findings do not show that plaintiff has had the posses sion of any definite part of the mining ground in controversy, and plaintiff is therefore not entitled to a decree based on his actual possession of any specific portion.

Nor do the findings show that either party has acquired title under the act of Congress of May 10, 1872; both parties having attempted to make location after the passage of that act, and both having failed to distinctly mark their locations on the ground so that the boundaries can be readily traced.

Judgment and order reversed, and cause remanded for a new trial.

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JOHNSON v. BUELL.

(4 Colorado, 557. Supreme Court, 1879.)

[1] **Location must cover apex.** To the extent that a lode in its onward course or strike departs from the side lines of the patented location, the plaintiff in ejectment is not entitled to recover.

Error to District Court of Gilpin County.

The case is stated in the opinion.

L. C. ROCKWELL and CLINTON REED, for plaintiff in error.

H. M. & W. TELLER and G. B. REED, for defendant in error.

ELBERT, J.

This was an action of ejectment. The law as to the principal question discussed by counsel in this case has already been determined by this court. To the extent that the Ellieth lode in its onward course departed from the side lines of the patented location, the plaintiff was not entitled to recover: *Wolfley* v. *Lebanon Mining Co.*, 4 Colo. 112.

The condition of the record is such that we can not review the finding of the court upon the evidence. The map testified to by the witness Sayr is not preserved in the record, although it appears to have been put in evidence. The "Johnson shaft," the "Baxter barn and the shaft near it," "the shaft out of which the bottom fell," and other localities mentioned in the testimony of the several witnesses, are not designated on any of the maps or plats preserved in the record; nor can their *situs* on or off the respective mining locations be fixed from anything in the evidence, except as a matter of conjecture. The entire testimony centers around these several localities, and they are left afloat. For this reason it is impossible to examine the evidence, or pass on the questions made respecting it with any certainty.

The judgment of the court below is affirmed.

[1] *Iron Silver Co.* v. *Murphy*, 1 M. R. 548; *Flagstaff Co.* v. *Tarbet*, 9 M. R. 607.

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BLAKE V. THE BUTTE SILVER MINING COMPANY.

(2 Utah, 54. Supreme Court, 1877–1880.)

Vested rights in mineral lands. One who makes a valid location of a mineral lode and complies with the mining laws, local and national, obtains a vested right to such property, of which he can not be divested.

"Single vein" under old law; "all veins" under act of 1872. Under the law prior to May 10, 1872, each locator was entitled to but one vein, whereas under the act of Congress of May 10, 1872, he is entitled to all veins having the top or apex within his surface lines.

[1] **A patent of a mining claim based upon a location made under the act of 1866,** grants the government title to the surface ground mentioned therein, subject to the right of other locators to follow any other vein or lode legally held under locations made prior to the act of May 10, 1872.

Right to follow unpatented vein into patented ground. The owner of a vein located prior to May 10, 1872, and who was in the possession thereof at such date, has the right to follow his vein within the patented surface ground of another.

Appeal from the Third Judicial District Court.

The facts are stated in the opinion of the court.

TILFORD & HAGAN and J. R. MCBRIDE, for Blake, appellant.

BENNETT & HARKNESS, for The Butte Co., respondent.

BOREMAN, J., delivered the opinion of the court.

The contest in this case is between the Oregon Mining Claim and the Butte Mining Claim. Both locations were made prior to the enactment of the law of 1872, respecting mining locations. The Butte was prior in time, as it was located on the 9th day of August, 1870, and the Oregon was located on the 20th day of September, 1871. The Butte claim was afterward patented, and against the procuring of which patent the Oregon claimants did not protest. The surface grounds of these claims conflict, but the Butte lode and the Oregon lode are separate and distinct veins. The Oregon

[1] *Eclipse Co.* v. *Spring*, 59 Cal. 304.

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lode extends within the boundaries of the Butte location, and hence the respondent lays claim thereto. The respondent began work upon the Oregon lode, but within the boundaries of the Butte patent. Thereupon the appellant obtained a temporary injunction, which, upon motion of respondent, was dissolved. From the order dissolving the injunction this appeal is brought.

A person who makes a valid location of a mineral ledge or lode, and complies with the laws and the local mining rules in respect thereto, obtains a vested right to such property, of which he can not be divested.

The act of the 10th of May, 1872, says "that nothing contained in this act shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws." U. S. Rev. Stat., § 2344.

The law of 1872 says further, that mining claims "hereto fore located shall be governed as to length along the vein or lode by the customs, regulations and laws in force at the date of their locations." U. S. Rev. Stat., § 2320.

Under the law as it stood prior to the act of 10th May, 1872, there is no question as to what the relative rights of the parties would have been, for under that law each locator was entitled to but one vein, whereas under the law of 1872 he is entitled to all veins having the top or apex inside his surface lines. The only question is as to whether the law of 1872 changes these relative rights.

The application for patent was based upon a location made under the law of 1866, which gave the party but one vein, and prior to the law of 1872 the rights of parties claiming other veins could not have been affected by any patent that the applicant could obtain. These rights of plaintiff to this separate vein being, by the last section of the act of 1872, as we have seen, expressly reserved and protected from any harm by that act, it was not necessary that he should protest. Had he protested, he could have secured no more than is secured to him by the law without his protesting.

Under the law of 1866 he had the right to the full length of his claim as located along the vein. As that right is not impaired in any way by the law of 1872, the appellant still has that right.

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Nor do we see that it was necessary that he should have done work on that part of his vein embraced within the surface boundaries of the respondent. It is not denied that this portion of the vein was within his location claim. He had made his location according to law and mining rules, and the doing of work upon any part thereof, and being in possession thereof when such work was done, and claiming to the full extent of his location, would be sufficient. The appellants, therefore, had, under the statute, the right to that part of the Oregon lode which entered the land of respondent, and the respondent had no right whatever thereto.

But the patent itself, which the respondent sets up as the basis of his action, does not purport to grant the Oregon vein to respondent, but it says that the grant is "subject to the right of other parties to follow any other vein or lode, with its dips, angles and variations, legally held under a location made prior to such date."

If this provision had been left out of the patent, the position of the parties would not have been affected, as their rights are governed by the law. But when a patent is presented which, on its face, negatives the claim of the patentee to other valid locations, it would seem that respondent's want of title to any such other vein was clearly manifest.

For the reasons given, we think that the order of the court below should be reversed with costs.

Emerson, J., concurred.

Schaeffer, C. J., dissented. Opinion omitted.

McCormick, Appellant, v. Varnes et al., Respondents.

(2 Utah, 355. Supreme Court, 1878–80.)

[1] **Local mining laws.** Congress has given the local laws and customs of miners the force and effect of laws, so far as they are not in conflict with any superior law.

[1] *Johnson* v. *McLaughlin*, 3 West C. R. 367.

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"Location" includes surface. The notice of location is presumed to refer to the surface ground, as well as to the vein or lode located, and if the latter is held by the notice of "location," such location must be along the general course or strike of the vein.

[1] **Claim to vein limited by surface lines.** It is clear that the government did not intend, by the act of Congress of July 26, 1866, to authorize the miner to locate, or itself to grant, two separate and distinct estates in a mining location, one in the surface ground, and the other in the vein or lode, whenever the latter might be found to run in its course, without regard to the surface ground.

[2] **Vein can be followed beyond, only on its dip.** Under the provisions of sections 2 and 4 of the act of Congress of July 26, 1866, the right to follow a vein claimed under a mining location, is expressly confined to *depth*, and such act can not, by any fair construction, be made to apply to the strike or course of the vein.

Location must cover vein, dip excepted. The foregoing sections of the act of Congress referred to, qualify and enlarge the common law right by which miners hold their locations, to this extent only: That the owner of a mining claim may follow his lode or vein from the apex found within his surface ground, on its dip, to any depth, although in its downward course it may so far depart from a perpendicular as to enter the land adjoining; but he can not go beyond his side lines on the course or strike of the vein.

Location must follow the strike. The location of a mining claim should be made along the course of the vein or lode, so as to include the same within its boundaries; otherwise it will only secure so much of the lode or vein as it actually covers.

Appeal from the Third Judicial District Court.

The facts appear in the opinion of the court.

SUTHERLAND & KIMBALL, for appellant.

BENNETT & HARKNESS, for respondents.

EMERSON, J., delivered the opinion of the court.

The complaint sets up a title to the Flagstaff mine in the appellant, and that he and his grantors have been actually in possession continuously since before March 22, 1872; that the respondents were engaged in tortiously taking out ore from this property and threaten to continue so to do. An injunction to restrain them from so doing was prayed for.

The respondents' answer admitted the appellant's title to whatever ground was patented as the Flagstaff mine, and sur-

[1] *Gleeson* v. *Martin White Co.*, 9 M. R. 429.
[2] *Flagstaff Co.* v. *Tarbet*, 9 M. R. 607.

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face ground, and his possession of the mining ground in question, but denies his title to the latter, claiming that the ground in question is not within the Flagstaff patent, and not covered by the deed to the appellant, and claiming title to the same in themselves, by virtue of a location and work in accordance with the local rules and regulations of the district, and asking affirmative relief by way of an injunction against the appellant.

The appellant's prayer for an injunction was denied, and the respondents' granted. The appeal is from both of these orders.

Upon the hearing there was no dispute about the facts in the case, which are substantially as follows:

The Flagstaff mine was located on the 19th of March, 1870. The notice of location reads as follows: "Notice is hereby given, that we, the undersigned, claim twenty-two hundred feet of this vein or lode, together with all dips, spurs, angles and variations, to be known as the Flagstaff. Course of the lode, northerly and southerly." Then follows the names of the claimants and the number of feet claimed by each, both northerly and southerly, with the notice that a certain number of claims *north*, with a like number *south*, are to be worked in company and undivided.

A patent for this claim was applied for by and granted to the Salt Lake Mining Company, who, pending the application for a patent, deeded the Flagstaff Mining Company, the immediate predecessor in interest of the appellant.

The survey and diagram and description in the patent correspond with the notice of location, additional numbers having been subsequently located.

The respondents, on the 4th day of July, 1877, located the Nabob mining claim, the discovery point being about one hundred and fifty feet westerly from the westerly side line of the Flagstaff claim, and running westerly from the discovery point along the general course or strike of the vein.

It is admitted "that the Flagstaff and Nabob mining claims are on the same vein; the discovery and location point of the latter being about one hundred and ninety-one feet northwesterly from the discovery and location point of the Flagstaff, and all the work done on the Nabob mining claim, and all

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works on the vein therein, are within three hundred feet of the discovery point of the Flagstaff and on the same vein."

From the diagram accompanying the record, it appears that the course or strike of the vein and the course of the Nabob mining claim from the point of discovery is about north fifty degrees west, and the course of the Flagstaff claim, by their diagram, surveys and patent, is north thirty-six degrees east. That is, the Flagstaff claim is laid across the vein and nearly at right angles with it.

The disputed ground is on the course of the vein and beyond and outside of the side lines of the Flagstaff surface ground.

It is claimed for the appellant that this ground, or rather that the vein at this point, is covered by the Flagstaff patent; or in other words, that the vein is located, held and granted, irrespective of the surface ground containing it, and that the grantee can follow it on its course outside of the surface lines of the claim. This is the point for us to decide and is the only question there is in the case.

Congress has given to the local laws and customs of miners the force and effect of laws, so far as they are not in conflict with any superior law.

The local law of the district, in force when the Flagstaff was located and patented, provided that "No person or company of persons shall be entitled to hold more than two hundred (200) feet as discovery of a lode, nor more than two hundred feet for each person located, and the number of feet in all shall not exceed three thousand (3,000) feet. The surface width requisite for mining or milling purposes, or for convenient working of the same, shall not exceed fifty (50) feet *on each side of the walls of said vein or lode.*" Art. 12 of the By-Laws of Little Cottonwood District.

Construing the notice of location with this provision of the by-laws, it is evident that at the time of the location the locators supposed that the vein or lode ran northerly and southerly. All their claims were in accordance with that notion. Nothing is said in their notice of location about the surface ground. They simply gave the direction and extent in linear feet, not of the surface ground but of the vein or lode claimed to have been discovered upon its supposed course or strike,

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depending upon the local laws for the extent of their surface ground. That was incident to their claimed discovery.

From the language used in the by-law above quoted, which is similar to that in all other districts, except as to the *amount* which may be claimed, there would seem to be no room to doubt but that miners understood that surface ground is taken on each side and including the vein, and that when he locates and claims his surface, he locates and claims the vein or lode within it.

Is there anything in the act of Congress which enlarges or changes this claim or right? The act of Congress of July 26, 1866 (14 U. S. Stat. at Large, p. 251), provides, "That wherever any person, or association of persons, claims a vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar or copper, having previously occupied and improved the same according to the local customs or rules of miners in the district where the same is located * * * may enter such tract and receive a patent therefor." * * * So that before this patent was obtained proof must have been made that they had previously occupied and improved their claim, according to the local rules and customs of miners in that district. By such rules and customs they were entitled to the claim for the length claimed, limited in its linear extent by the act of Congress, as well as by the local rules, and with surface not to "exceed fifty (50) feet on each side of the walls of said vein or lode."

It is claimed on the part of the appellant that the act of Congress above referred to, in its second and fourth sections, gives the right to follow the vein or lode on its course, although it may enter the land adjoining, or as expressed in this brief, "that when a vein or lode is claimed, and the claimants have filed a diagram, been permitted to enter the tract, and have received a patent containing a grant according to the language of the statute, or as authorized by the statute, the vein must be granted to the extent of the linear feet located, without any statement of the direction, and without regard to the relative situation of the surface ground."

The language used in the act does not warrant any such construction.

By section two it is provided that whenever any person or

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association claims a vein or lode, having occupied and improved the same according to local rules or customs of miners in the district where the same is situated, and having expended in actual labor and improvements thereon not less than one thousand dollars, and there is no opposing claim, it shall be lawful for such claimant, or claimants, to file in the local land office a diagram of the same, so extended laterally or otherwise as to conform to local rules, laws and customs, and to enter such tract and receive a patent therefor granting such mine, together with the right to follow such vein or lode, with its dips, angles and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition.

Section three provides for filing the said diagram in the local land office, posting the same, publishing notice of application, posting notice and diagram in local land office, final survey, etc., and also provides, "But said plat, survey or description, shall in no case cover more than one vein or lode."

Among other things, the fourth section provides "that no location hereafter made shall exceed two hundred feet in length along the vein for each locator, with an additional claim for discovery to the discoverer of the lode, with the right to follow such vein to any depth, with its dips, variations and angles, together with a reasonable quantity of surface for the convenient working of the same as fixed by local rules."

If in this connection we consider the local rules above quoted, providing that parties locating mining claims in that district were entitled to their surface ground "on either side of the walls of their vein," it will be apparent that the diagram provided for in section two of the act of Congress could only be extended laterally fifty feet on each side of the walls of the vein or lode. If extended otherwise, such extension would not be made "so as to conform to the local laws, customs and rules of the miners," as provided in the act.

The line of location includes the surface ground and the vein or lode, and "measures the extent of the miner's right." He can claim the surface ground because it is within a certain number of feet on either side of his line of location—of a vein of mineral which he claims to have discovered.

It is undoubtedly true, as argued by counsel for the appel-

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lant, that the mineral vein or lode is the valuable thing sought after by the miners. It is that which he discovers, or claims to have discovered. And when he has made his discovery, if he desires to reap the benefit of it, he must make his location in accordance with the acts of Congress and the local rules and customs of the district. The "location" refers to the surface ground as well as to the vein or lode, and if the vein or lode is held by the "location," that must be along the general course or strike of the vein.

It seems to me clear that the government did not intend to authorize the miners to locate, or itself to grant two separate and distinct estates, one in the surface ground, and the other in the vein or lode wherever it might be found to run in its course, without regard to the surface ground.

It seems to me equally clear that the right to follow the vein given in sections two and four of the act referred to, is expressly confined to depth, and can not by any fair construction be made to apply to the strike or course of the vein.

The object of the notice and diagram required by the act to be published and posted, was unquestionably to give notice to adjoining claimants, and to all parties interested, as to the extent of the applicant's claim, in order that they might have the opportunity to contest his right to the patent for which he was applying. And because the vein or lode is the valuable thing for which the patent is sought, this notice refers to it, as well as the surface ground, and the diagram of the surface ground must embrace the vein or lode in its general course or strike. If the construction claimed by the appellant is to be given to the act—that is, that they have the right to follow the vein or lode, although it may enter the land adjoining, then the published and posted notices and diagrams required by it furnish no information as to where the valuable thing, for which the patent is sought, is situated. And after one location was made there would be no inducement to, or safety in, prospecting or locating on other claims within a circle the radius of which is the greatest distance claimed by the first locators from their discovery point either way.

Counsel for the appellant claims that they find authority for their construction of the law, in the opinion of Judge Field, in the case of the *Eureka Mining Co.* v. *Richmond Mining*

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Co., 4 Saw. 311, and quote and italicize "*the surface land* taken up in connection with a linear location on the ledge or lode is, under the act of 1866, *intended solely for the convenient working of the mine, and does not measure the miner's right, either to the linear feet upon its course*, or to follow the dips, angles and variations of the vein, *or control the direction he shall take.*" In the same connection, and immediately following the above, the learned judge says, "But the line of location does measure the extent of the miner's right. *That must be along the general course or strike, as it is termed, of the ledge or lode.* Lines drawn vertically down through the ledge or lode at right angles with a line representing this general course, at the end of the claimant's line of location, will carve out, so to speak, a section of the ledge or lode within which he is permitted to work, and out of which he can not pass."

This language supports the view here taken by us, rather than that of the appellant. No other idea can be obtained from anything contained in the opinion, but that the location must be along the general course or strike of the vein or lode.

Unfortunately for the appellant, the locators of the Flagstaff mining claim mistook the direction of the vein, and made their location across it instead of along its general course or strike. The court can grant no relief from the consequences of this mistake. No vein is guaranteed by the government to those who shall apply for a patent, but simply promises a patent to such as go upon and explore the public domain, and, having made such exploration, represent to the government what they claim to have discovered, and where it is located.

The miner is left free to make his choice of location as he sees fit, and ample opportunity is given him to determine the situation of his lode or vein. If he makes this choice without sufficient exploration to guide him in making the location, the blame rests upon himself.

Under the rules of the common law, he would only be entitled to whatever might be over and under the surface of a segment of the earth, carved out by the exterior lines of the location extended downward indefinitely. Sections two and

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four, of the act referred to, furnish the only qualification or enlargement of the common law right by which miners hold their claims, and that is to this extent only, that they may follow the lode from the apex found within the surface ground, on its dip to any depth, although in its course downward it may so far depart from a perpendicular as to enter the land adjoining. This must necessarily be beyond the side lines of the location, because under all laws the end lines form a bulwark beyond which the miner may not go. But he can not go beyond or outside of his side lines on the course or strike of the vein; it is only on its dip that this may be done.

The Flagstaff patented ground does not cover or embrace any part of the vein or lode on its course, or strike outside of and beyond the side lines, and the appellant has no right under the patent to work in or extract ore from the disputed ground.

The orders made by the court below are affirmed, with costs.

SCHAEFFER, C. J., and BOREMAN, J., concur.

SOUTHERN CROSS GOLD AND SILVER MINING CO., Respondent, v. EUROPA MINING CO., Appellant.

(15 Nevada, 383. Supreme Court, 1880.)

[1] **Marking corners and center lines.** Stakes and stone monuments, set at each corner of the claim and at the center of each end line, is a sufficient marking of the boundaries under the most stringent construction of the act of Congress.

[2] **A record is not essential** under the act of Congress, unless made obligatory by local regulations.

Sufficiency of record. A location notice of record calling for corner monuments, and described as bounded by four other claims, *held* a sufficient description.

Assays, proof of vein discovered. Assays made from the rock after a location made, are competent evidence tending to prove that a vein had there existed and been found at the time of the location.

[1] *Jupiter Co.* v. *Bodie Co.*, 4 M. R. 412; trees are valid monuments: *Quimby* v. *Boyd*, 6 Pac. R. 402.

[2] *North Co.* v. *Orient Co.*, 9 M. R. 530.

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Appeal from the District Court of the First Judicial District, Storey County.

The facts appear in the opinion.

LEWIS & DEAL, for appellant.

KIRKPATRICK & STEPHENS, for respondent.

By the Court, BEATTY, C. J.

This is an action to recover possession of a mining claim. The defendant, appealing from the judgment and order denying its motion for a new trial, contends that the district court erred in finding as a fact that there was a sufficient marking of the boundary lines of the location under which the plaintiff claims the ground in controversy.

We think there was abundant evidence to sustain the findings of the court on this point. It showed that stakes and stone monuments were put at each corner of the claim and at the center of each of the end lines. This was much more than the marking held to be sufficient in *Gleeson* v. *Martin White Co.*, 13 Nev. 462, and as much as has ever been required under the most stringent construction of the mining law.

Next, it is contended that no sufficient record of plaintiff's claim was proven.

Record is not, under the act of Congress, essential to the validity of a mining claim: *Golden Fleece Co.* v. *Cable Con. Co.*, 12 Nev. 323. It is only necessary when made obligatory by local regulations, and there was no proof in this case of any such local rule. It was, however, proved that plaintiff's notice of location was recorded in the district records, and we think that the notice contained enough in itself to satisfy the law. It called for stone monuments at each corner of the claim, and described it as bounded by four other claims. If it were necessary, in order to support the findings of the court, we would presume that these other claims were well known and defined by permanent monuments. If they were so defined, there can be no question that plaintiff's notice was suffi-

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ciently definite as to the *locus* of its claim, and it is not pretended that it was deficient in any other respect.

Lastly, it is said the district court erred in permitting an assayer to testify to the results of assays of rock taken from plaintiff's claim long after the date of its location.

The object of this testimony was to prove that the locators had discovered a vein at the time of the location, and appellant contends that it had no such tendency, and was therefore immaterial and irrelevant.

We think the evidence had a distinct tendency to prove the fact at issue. It proved the existence of mineral-bearing rock in the claim at the date of the assays, and since veins do not grow and become mineral-bearing in a year or two, it proved that the vein was there at the date of the location, and proof of the existence of a vein is an essential step in proving its discovery.

The record discloses no error in the proceedings of the district court, and the judgment and order appealed from are affirmed.

FAXON v. BARNARD ET AL.

(2 McCrary, 44. U. S. Circuit Court, District of Colorado, 1880.)

[1] **Failure to record within statutory period.** Failure to record the location certificate within the three months from date of discovery as required by statute of Colorado, does not invalidate the claim when the record has been completed before another title has been perfected to the same ground.

Idem—Facts of the case. The Green Mountain lode was discovered in August, 1877, but its record was not made till March, 1878. The Ontario lode was discovered in February, 1878, and its record made in July of the same year. Their surveys overlapped each other. *Held*, that the Green Mountain had not lost its priority by the delay in filing its location certificate.

Indefinite description in location certificate. A location certificate which describes a lode claim as situate "on the north side of Iowa Gulch about timber line on the west side of Bald Mountain * * * staked and marked as the law directs," *held* void for uncertainty and not a com-

[1] *Johnson* v. *McLaughlin*, 4 Pac. R. 130; *Jupiter Co.* v. *Bodie Co.*, 4 M. R. 412.

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pliance with § 2324 U. S. Revised Statutes, requiring a reference to some natural object or permanent monument.

[1] **Rights of discoverer in possession.** One in actual possession having uncovered the lode, though failing to file upon the claim as required by law, can not be ousted by a subsequent discoverer, as to the ground actually held. A location may be valid up to, but can not be extended beyond a senior discovery in the actual possession of another.

Presumption of continued possession. Possession of a shaft being shown at one time, the burden of proof is upon the party who asserts that it did not continue.

G. G. WHITE, for plaintiff.

MARKHAM & PATTERSON and THOMAS & CAMPBELL, for defendants.

The cause being heard on motion of plaintiff for temporary injunction, the court held as follows, the facts sufficiently appearing in the opinion.

HALLETT, D. J.

Plaintiff claims the Ontario lode as having been discovered by George A. Gibson and others, on the public land, February 11, 1878, and the location completed in July of the same year. Defendants claim the Green Mountain lode as having been discovered by Benj. Barnard, in August, 1877, and the location completed by filing for record a certificate of location in March, 1878. These are rival locations overlapping each other at the north end of the first and the south end of the second to the extent of two and seventeen one hundredths acres, which is the ground in controversy in this suit. A question common to both claims is, whether a certificate of location must be filed of record in the office of the recorder of the county in which the claim may be, within three months next after the discovery of the lode, as required by the act of assembly of 1874, R. S., 629. In terms the act requires the certificate to be filed within that time, and to secure the claim from the date of discovery against intervening claimants seeking to locate the same ground, it would seem to be necessary to comply with its pro-

[1] As to the various distinctions on this point see *Weise* v. *Barker*, 2 West C. R. 108; *DuPrat* v. *James*, 3 Id. 651; *Cowell* v. *Lammers*, Id. 504; *Erhardt* v. *Boaro*, 4 M. R. 432, 434 (on appeal, 113 U. S. 527); *North Noonday Co.* v. *Orient Co.*, 9 M. R. 524; and especially *Sweet* v. *Webber*, 7 Colo. 443; 4 West C. R. 116.

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visions. But no reason is perceived for saying that the certificate shall be invalid if not filed within the time fixed by law. The design of the law clearly is to give the discoverer time for doing the acts necessary to a proper location. He may sink his discovery shaft within sixty days; he may put up his discovery notice and his boundary stakes, and record his certificate of location within three months; failing in this he shall have no right as against one who has been more diligent in fulfilling the statute, although later in point of time. But when all things have been done as the act requires, before any other and better right to the same ground has been perfected, it seems to be just and entirely consistent with the statute to recognize the location as having been properly made.

Applying this rule in the present case, and accepting the averments of the parties respecting their locations as true, we find that although each overstepped the statute, they may have precedence according to the dates of discovery. Beginning in February, 1878, plaintiff's grantors completed their location in July of that year. It is indeed stated in some affidavits in support of the bill that the Ontario lode was discovered in the autumn of 1877. But we can not allow the plaintiff to go aside from, or beyond, the allegations of his bill, and as he has averred that the lode was discovered in February, 1878, that will be accepted as the true date. Beginning in August, 1877, defendants completed their location in March, 1878, at which time plaintiff's grantors had not secured any right to the ground in controversy, as they had not then done all that was required to complete their location. If, then, the matters in issue were to be determined upon, the question of priority of discovery and location, defendants' would prevail. There is, however, another objection to defendants' certificate of location, that it does not refer to a natural object or permanent monument from which the claim may be identified. We are not asked to consider what may be a natural object or permanent monument to which reference may be made, or whether the language of the certificate in making such reference is sufficient under the law. For there is not in the certificate anything whatever as to any natural object or monument. It is said that the claim is "situated on the north side of Iowa Gulch, about timber line on the west side of Bald Mountain. Said claim is staked and marked as the law directs." It is ut-

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terly impossible to find in this language any reference to a natural object or permanent monument defining the location, and the only question is as to the effect of the omission. The act of Congress requires such reference to be made in the description of the claim: R. S., Sec. 2324; and the State legislature has declared that the certificate shall give "such description as shall identify the claim with reasonable certainty." R. S. Col. 630. Compliance with the act of Congress would fulfill all that is required by the State, and it may be said that the acts are in perfect harmony. But if that were otherwise there is no doubt as to authority of Congress nor as to the purpose of the law in requiring that the claim shall be definitely described.

The government gives its lands to those citizens who may discover precious metal ores therein, upon the condition that they will define the subject of the grant with such certainty as may be necessary to prevent mistakes on the part of the government and on the part of other citizens who may be asking the like bounty. This is reasonable and necessary to justly administer the law, and therefore it must be said that without such description a certificate of location is void. On that ground the original certificate of defendants' grantor will be rejected and as the re-location was posterior to plaintiff's it can not prevail against the latter. It remains to consider what would be the effect of actual possession by defendants or their grantors at the time the Ontario lode was located. For it appears that defendants' discovery shaft is in the ground in controversy, and they aver that they have been in possession since the lode was first opened. That they have not worked there constantly may be inferred from what has been done, for as the shaft is now only fifty feet deep, it is difficult to believe that three years and more have been occupied in sinking it. But defendants say that they have been on the ground constantly, and plaintiff asserts that they have never been there at all. In this conflict and imperfect statement of testimony, it is impossible on a preliminary motion of this kind to ascertain the fact, and we resort to some general rules which should control.

Plaintiff's position is and must be, that the lode discovered by his grantors six or seven hundred feet from the ground in controversy, extends from thence to the point occupied by de-

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fendants, and that defendants are on the same lode. Assuming that to be correct, the question is whether defendants or their grantors were in actual possession at the time plaintiff's location was made. That they were on the ground before that time is shown by testimony which is not contradicted, and the burden is upon the plaintiff to show that they were not there at the time of his location. For if they were then in actual possession, having uncovered the lode, plaintiff's grantors, claiming by subsequent discovery, could not oust them so long as they saw fit to remain there. As to the ground actually held by them, although if they failed to locate under the law they could not claim more, no one by junior discovery could assert a superior title. Plaintiff's location may be valid up to the very point occupied by defendants' grantors, but it must be said that a location can not be extended over a senior discovery in the actual possession of another. And so the evidence tending to prove that defendants or their grantors may have been in possession of the shaft in controversy at the time of plaintiff's location, and plaintiff having failed to meet that evidence successfully, the motion for injunction will be denied. All assumptions of fact have, of course, been made on the proofs as they now stand. At the hearing, if the facts should appear to be different, the view now expressed may be modified.

MYERS ET AL. v. SPOONER ET AL.

(55 California, 257. Supreme Court, 1880.)

Essential requirements in location. When under district rules it is required that the boundaries be marked with a ditch, and that stakes be placed at the corners, and these regulations are not complied with, no valid location is made.

Intention of abandonment, how proved. Abandonment is a question of intention, but the statement by a party that there was no intention to abandon is not conclusive. The intention is to be found from all the facts and circumstances of the case.

Error, not followed up. Where the record shows an improper question asked, objected to, and the objection overruled, the record must further show, to be error, that the improper question was answered by the witness.

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[1] **Effect of mistake of recorder—Acts of location operate as notice.** It appeared on the trial that the district recorder, in recording the notice of one of the defendants' claims, omitted by mistake, one of the lines, but in fact the lines were distinctly marked on the ground, as required by the mining rules: *Held*, that the defendants were not bound by the mistake of the recorder, and that the actual location on the ground was sufficient to impart notice to all comers.

Appeal from a judgment for the defendants, and from an order refusing a new trial in the Fourteenth District Court, County of Nevada. REARDAN, J.

The facts are stated in the opinion.

JOHNSON & CROSS, and E. B. DRAKE, for appellants.

NILES SEARLES and A. B. DIBELE, for respondents.

ROSS, J.

Ejectment to recover a mining claim. The answer denied the plaintiffs' alleged title, averred title in defendants and interposed the plea of the Statute of Limitations. The case was tried in the court below with a jury, a verdict rendered for the defendants, upon which judgment was duly entered, and from the judgment, as well as from the order refusing them a new trial, the plaintiffs prosecute this appeal.

We have looked carefully through the record and can not say that the evidence does not support the verdict. It appears that on the 26th of November, 1856, E. A. Leathe, one of the plaintiffs, and one Holton, located the ground in controversy by recording the same in the mining records of the district as the Holton & Co. claims, and by posting a notice thereon and, as some of the witnesses for the plaintiffs testified, by setting stakes at the corners and digging a small ditch around the claims. The mining rules and regulations of the district required, among other things, that, in locating a claim, stakes should be put up at each of its corners, and also that it should be bounded by a small ditch. At the trial there was evidence given on behalf of the defendants tending to show that these requirements were not complied with on the part of the locators, under whom the plaintiffs claim. There was therefore

[1] *Weise* v. *Barker*, 7 Colo. 178.

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a conflict in the testimony on this point. Holton, soon after the location mentioned, transferred his interest in the claims to Leathe, and left the State. None of the other locators were, so far as appears, residents of the vicinity, or knew anything of the location. Leathe left the neighborhood in a few weeks, and for fifteen years next after the location no work whatever was done thereon, and, so far as appears, no assertion of ownership made to the ground by plaintiffs or for them, or on their behalf. The ground, however, is what is known among miners as "back hill" ground, and could not and can not be worked to advantage until the earth in front is carried off. The rules and regulations of the district required all claims to be worked every ten days, but it seems that this rule was generally disregarded, although some of the witnesses for the defendants who held claims in the district testified that they had regarded it as all the time in force. The rules and regulations, however, did not provide for any forfeiture or penalty in the event the work was not performed. In April, 1858, the *locus in quo* being apparently vacant land, R. N. Palmer and others, under the name of the "Joint Stock Company" located twenty claims, recorded them, posted a notice thereon, set stakes at the corners, dug a ditch around the ground, and soon after sunk a shaft seventy-five feet deep thereon. This location covered a portion only of the Holton location. In October, 1859, Sweetland, Bicknell and others, believing the Joint Stock Company to have more ground within their lines than they were entitled to hold under the local rules and regulations, located twenty-six claims, covering a portion of the Joint Stock Company and the residue of the Holton location. They dug a ditch around the ground located, staked it off, posted a notice thereon describing the ground, and filed a copy thereof for record. In recording this notice the district recorder omitted by mistake one of the lines. In 1869 the Joint Stock Company, the Sweetland and Bicknell Company, and still another company, claiming ground to the west of them, consolidated their claims under the name of the Joint Stock Company, reditched the whole, and placed large painted stakes at the corners and angles thereof, containing the name of the company. The deed of consolidation was executed in 1871. The companies named also sunk a shaft 118 feet deep, drifted

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and mined the claim, always keeping the exterior ditches well defined and the stakes in place, until 1872, when they sold to the present defendants, who have since worked the claims. In November, 1871, R. B. Patton, one of the plaintiffs, obtained a deed from Leathe for one share in the Holton claim and entered upon it, reset the stakes and dug a ditch all around it, except on the boundary line between it and the Watson and Stevens claim; and he performed work on the ground during that year and the succeeding years of 1872–3–4 and 5.

We think the evidence sustains the verdict, first, because if it were true, as some of the testimony given on the part of the defendants tended to show, and of which the jury were the judges, that in locating the Holton & Co. claims the important conditions of the local rules and regulations requiring the boundaries to be marked with a ditch and stakes to be placed at the corners were not complied with, then it would follow that no valid location was made; and the jury having found for the defendants upon this as well as upon all other questions of fact, we can not disturb the verdict, there being a substantial conflict in the evidence. Secondly, we can not say upon the facts as they are made to appear in the record, that the jury was not justified in finding an abandonment of the Holton & Co. claims prior to the location of the same ground by the parties under whom the defendants claim. Abandonment is a question of intention, and of this intention the jury were to judge, and did judge in view of all the facts and circumstances of the case. It is true, as stated in the brief of counsel for appellants, that Leathe testified at the trial that there was no intention by him or his colocators to abandon the claims. But his testimony to that effect was not conclusive upon the jury. If that was so, it would follow that all any party would have to do in order to defeat the defense of abandonment would be to say he did not intend to abandon. The intention, however, is to be derived, as already observed, from all the facts and circumstances of the case. Considering those facts and circumstances, the jury found for the defendants, and we can not disturb the verdict on that ground: *Moon* v. *Rollins*, 36 Cal. 333; *Keane* v. *Cannovan*, 21 Id. 303–4; *Harvey* v. *Ryan*, 42 Id. 626; *Morenhaut* v. *Wilson*, 52 Id. 263.

It is urged on behalf of the appellants, that the court below

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erred in permitting "evidence of the admissions and statements of plaintiff Patton (as well as of his acts), spoken and done before he was a tenant in common with his co-plaintiffs, to go to the jury against the defendants' objections." This objection of counsel assumes what the record does not show to be the fact. On cross-examination the witness was questioned by the defendants' counsel as to his knowledge concerning the Joint Stock, the Sweetland-Bicknell, and the Joint Stock Company Consolidated locations, and in response to the question, to which there was no objection, the witness said: "I just knew of their locations by the record, and I once saw a stake which had fallen down, way down at the lower end, near the reservoir — just on the bank of the reservoir." The defendants then proposed to question the witness, Patton, concerning conversations had between him and some of the defendants prior to the conveyance to him, to which the plaintiffs objected, and which objection the court overruled. The ruling, however, could not possibly have injured the plaintiffs, since the record fails to show that any such question ever was, in fact, asked or answered by the witness. The witness subsequently testified, "that on one occasion he carried the chain and assisted in making a survey on the Joint Stock Company's ground, and that he had suggested the name of 'Joint Stock Company' for the claim." This was responsive to the questions of counsel for defendants, already referred to, respecting the knowledge of the witness in the matter of the location by the Joint Stock Company, and was proper.

The only other point made for the appellants which we deem it necessary to notice, is, that the defendants are concluded by the lines of the claim as shown in the records of the mining district. As already stated, the district recorder, in recording the notice filed by Sweetland, Bicknell, and others, in 1859, omitted, by mistake, one of the lines. Several witnesses for the defendants testified that all of the ground in dispute was embraced within the locations under which the latter claim, and plaintiff Patton himself, after testifying that a portion of the premises was *omitted*, said: "In saying the Joint Stock Company's lines leave out a portion of the ground in dispute, I mean to say the lines *as described in the mining record;* the stakes and ditches of the Joint Stock Company

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included all the ground in dispute. There may be a mistake in the record, by the recorder's skipping and failing to record one of the lines in the Sweetland and Bicknell location I don't know as to that, I only know the record as it appears."

We do not think the defendants are bound by the mistake of the recorder in copying the notice in the book of records: *Kelly* v. *Taylor*, 23 Cal. 11; Weeks on Mineral lands, § 104.

There was testimony given at the trial tending to show that all the steps required by the local rules and regulations were performed by the locators making the locations under which the defendants claim; that the lines were distinctly marked upon the ground, a ditch dug and kept open, stakes struck, and notices posted. This was sufficient to impart actual notice to all comers. No one could have been injured by the mistake of the recorder, and we think the judgment and order should be affirmed. So ordered.

McKINSTRY, J., and McKEE, J., concurred.

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[1] NORTH NOONDAY MINING CO. v. ORIENT MINING CO.

(6 Sawyer, 503; 11 Federal, 125. United States Circuit Court, District of California, 1880.)

Citizenship proved by affidavit. Citizenship of the locator of a mining claim may be proved by his affidavit, under § 2321, U. S. Revised Statutes, in controversies in the courts concerning title, as well as in land office proceedings.

The presumptions controlling, and the difficulty of proving citizenship, in many cases, considered.

[2] **Actual possession without valid location.** Where a party is in possession of a mining claim, claiming title under a conveyance by specific bounds, and is engaged in actually working the same within his lines as marked on the ground, a party entering upon such prior right is a trespasser, and can gain no right as against the possessor; he can not initiate a pre emption or other title by a trespass

[1] S. C., 9 M. R. 529.

[2] Compare *Gleeson* v. *Martin White Co.*, 9 M. R. 435, at the paragraph beginning "There can be," etc., and see note 1, page 516.

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New trial—Error without injury. Even where error may have intervened, a new trial should not be granted, when it is clear that no injury has been done, and that the verdict ought, upon the whole record, to stand as it is.

Motion for new trial in the case reported, 6 Saw. 299. The facts are sufficiently indicated in the charge set out in the former report, and in the opinion of the court.

STEWART, VAN CLIEF & HERRIN, for plaintiff.

R. M. CLARK and GEORGE B. MERRILL, for defendant.

SAWYER, Circuit Judge.

All the points made by defendant on motion for new trial were fully argued and considered at the trial, and I see no good reason for changing the rulings then made. The point most confidently relied on by defendant seems to be the admission of the affidavit of Smith to prove his citizenship. I am not entirely certain that any other evidence was necessary to raise the presumption of citizenship than the fact that he had resided in the United States from his infancy—during all the period of his remembrance—he having no personal knowledge of having been alien born, and no recollection of ever living elsewhere, and there being no evidence from any one having knowledge that he was foreign born. If this be so, then there is no evidence to overthrow the presumption, other than his statement that he was informed that he was born in Ireland, and brought to this country by his parents when two years old; and this is but hearsay; and his counter statement that he was informed in the same manner and had always understood that his father became naturalized while he was a boy, is, at least, as good. If the hearsay evidence was inadmissible and proves nothing upon the one point, it was equally so on the other. It must all be taken or all be rejected together. But if it was necessary to make this additional proof, the affidavit was, undoubtedly, inadmissible upon the general principles of evidence unaffected by statutory provisions.

The statute, however, has made especial provisions for such cases in section 2321, which says: "Proof of citizenship un-

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der this chapter may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge, *or* upon information and belief." This provision must of necessity contemplate an affidavit to some extent based on information and belief, for no man can, of his own personal knowledge, state where he was born. It is an event occurring before he has acquired a capacity to remember. It also substitutes an affidavit for the record in this case of one having been naturalized. It also contemplates an affidavit on information and belief, where the naturalization of persons other than the party making the affidavit is concerned, for the affidavit of the "authorized agent" of associations not incorporated may be "upon information and belief." It might be utterly impracticable for a person whose father had been naturalized and moved to some distant territory, and died during his infancy, as is supposed to be the case in this instance, to ascertain in which one of the hundreds of courts in the United States, having jurisdiction, the father was naturalized. At all events, in view of the practical difficulties in making the proofs, or for some other reason, the statute has modified the rule of evidence in this instance, and made such affidavits not only competent, but sufficient proof of citizenship; for it requires no other. It is insisted, however, that this is admissible only in the land office for the purpose of entitling the locator to a patent, but does not extend to suits between private parties respecting the right to the claim. But the statute says "*under this chapter*," and the chapter provides for sending the parties to the courts to try their rights when there are conflicting claims; and in my judgment the provisions apply to all the purposes of the act—to the litigation of all claims arising under the act, whether in the department, or in the ordinary courts of the country. Evidence which is competent and sufficient to establish a right to a patent to a mining claim as against the government—the actual owner of the land and mine—ought to be competent and sufficient to maintain the party complying with the statute in his possession and claim against a stranger trespassing upon his possession and claim, which would be otherwise recognized as valid by the statute as against the government. I do not think Con-

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gress designed to establish one rule of evidence or right for the government and another for citizens, as to the same claim arising under the statute, and especially in favor of trespassers upon the possessions of others. I therefore hold the affidavit of Smith to be competent evidence, and properly admitted under the statute.

But conceding, for the purposes of this decision, the admission of the affidavit as to citizenship to be erroneous, still, in view of the other uncontradicted testimony in the case, the error became immaterial. It appeared by clear, uncontradicted, positive testimony, that the plaintiff's grantors, some at least, of whom, were citizens before defendants entered, or began to run their tunnel, distinctly marked the three claims, limiting the Noonday North to 100 feet wide, by stakes driven at each corner and the center of the end lines, the stakes being three and a half feet high by four inches square, painted white and lettered, to show what they were and what claims they indicated, each claim so staked out being 100 feet wide and 1,500 long, lying side by side, and within the limits of the lines of the original Noonday North as located, 300 feet wide on each side of the center. These stakes bounded a parallelogram 300 feet wide by 1,500 long, marked by a line of five stakes, as described, on each end. These claims were conveyed to the plaintiff by one and the same deed, giving definite descriptions, and plaintiff went into actual possession and occupation of them, claiming title under the deeds up to the extreme boundary as staked off, long before defendant entered, and they so continued on the claims, erecting machinery and sinking shafts for working the claims, down to and at the time of defendant's entry and the trespass complained of, having, at the time of such entry and trespass, expended in labor and the collection of materials on the premises the amount of some twenty-five or thirty thousand dollars. So that before defendant acquired any rights, and down to and at the time of defendant's entry, the plaintiff was in the actual, active, dominating possession, occupation, and control of the premises thus marked out and thus conveyed, claiming the whole under the conveyance. Plaintiff's said stakes were still there, as described, when defendant entered and committed the trespass complained of, and defendant made its claim

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within the claims so at the time staked out. As to the extent of the possession of parties actually in possession claiming under deeds and up to marked boundaries, see *Hicks* v. *Coleman*, 25 Cal. 122, and the numerous cases from the United States Supreme Court reports therein cited: *Walsh* v. *Hill*, 38 Cal. 487.

The plaintiff, before defendant acquired any rights, and at the time of its entry and of the trespass complained of, was in as complete actual possession and occupation up to the boundary indicated by their stakes as it could well have been, except by inclosing it with a fence sufficient to exclude trespassers. The plaintiff was there physically present, by its agents, in active labor and control. This being so, independent of such constructive possession as the mining laws give by simple compliance with its provisions, there was a continual actual possession and occupation upon which defendant could not enter without being a trespasser. The Supreme Court of California held that a mining claim in actual possession of the claimants is valid, irrespective of mining laws: *English* v. *Johnson*, 17 Cal. 107; *Table Mountain Co.* v. *Stranahan*, 20 Cal. 209; S. C., 31 Cal. 390; *Hess* v. *Winder*, 30 Cal. 355; *Rogers* v. *Cooney*, 7 Nev. 219. These cases have been cited and approved by the Supreme Court of the United States in the recent case of *Campbell* v. *Rankin*, 99 U. S. 262. And as I understand the recent decisions of the Supreme Court of the United States, under the pre-emption laws no man can initiate a pre-emption, or other right under those laws, by an entry upon the actual possession of another, be that other a competent pre-emptioner, or rightfully in possession, as against the government or otherwise: *Trenouth* v. *San Francisco*, 100 U. S. 251, 256; *Atherton* v. *Fowler*, 96 U. S. 513. If that be so, the principle is equally applicable to rights acquired in mining claims. It would be strange indeed if Congress should pass laws to encourage trespasses and breaches of the peace, by authorizing a title to be initiated and founded upon a trespass upon the actual possession of another.

Upon the whole record I am entirely satisfied that a new trial should not be granted, even if there was error in admitting the affidavit of Smith, and the several other affidavits to which exception was taken, in the course of the trial, on the

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question of citizenship. On this view, also, errors in other rulings, if any there be, become immaterial.

Ordered that a new trial be denied.

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[1] NORTH NOONDAY MINING CO. V. ORIENT MINING CO.

(6 Sawyer, 299; 1 Federal R. 522. U. S. Circuit Court, District of California, 1880.)

[2] **Aliens can not locate.** Under the act of Congress of May 10, 1872, only citizens of the United States and persons who have declared their intention to become such, can acquire any right by location upon mineral lands on the public lomain.

Naturalization is a question of fact to be determined by the jury from the evidence.

Proof of naturalization—Affidavit. A foreign born son of an alien may become a citizen by being naturalized, or by the naturalization of his father during his minority; as tending to prove citizenship the affidavit of the party is made competent evidence for all purposes, under the Mining Act of May 10, 1872.

Power to limit width of lode claim. By implication the act of May 10, 1872, confers upon the miners the right to limit the width of a lode claim by (district) rule.

District rule must be in force. A miners' regulation, to be valid, must be in force at the time of the location. It does not, like a statute, acquire validity from its mere enactment, but from customary obedience and acquiescence, and becomes void when it falls into disuse or becomes generally disregarded.

[3] **Whether in force—A question of fact.** Whether a mining custom remains in force is a question of fact for the jury; having been adopted a presumption would arise in its favor, but parol proof that it was generally disregarded would show that it was no longer in force.

[4] **Mineral must be discovered before location.** No rights can be acquired under the statute by a location made before the discovery of a vein or lode within the limits of the claim located.

[5] **Location before discovery—How cured.** But if a location otherwise valid should be made and the vein afterward discovered, no other party intervening, the location would be valid to the limits of the claim.

Vein or lode defined. A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz or with some other kind of

[1] S. C., 9 M. R. 524.

[2] *Lee Doon* v. *Tesh*, 6 Pac. R. 97.

[3] *Riborado* v. *Quang Pang M. Co.*, 6 Pac. R. 125.

[4] *Orerman Co.* v. *Corcoran*, 1 M. R. 691; *Upton* v. *Larkin*, 6 Pac. R. 66.

[5] *Jupiter Co.* v. *Bodie Co.*, 4 M. R. 411.

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rock in place, carrying gold, silver or other valuable mineral deposits named in the statute. Its status as a vein is not affected by its being large or small, rich or poor; if it be a vein discovered, a location may be made upon it.

Side veins within the lines—Top or apex. The locator of a lode claim is entitled not only to the vein discovered but to every other vein throughout its entire depth, the top or apex of which lies within his surface lines extended downward vertically.

[1] **Marking boundaries.** A location must be distinctly marked on the ground so that *its boundaries can be readily traced.* Any marking on the ground claimed, by stakes and monuments and written notices, whereby the boundaries of the claim located can be readily traced, is sufficient.

Sufficient marking, by end stakes and notices. The marking of the center line of the claim by a prominent stake or monument at each end, with a written notice on one or both, claiming from stake to stake, with a specified number of feet in width on each side of the line, is a sufficient compliance with the law.

[2] **Location perfected before adverse claim exists.** A subsequent locator has no right to object to a location as not sufficiently marked at the time of its location, or before recording, *provided* it was sufficiently marked before any rights had accrued to such subsequent locator.

Record of mining claim. Where the district rule requires a record, it is necessary, otherwise not. A valid record must contain the name of the locator, the date of location, and such a description by reference to some natural or permanent monument as will identify the claim.

The natural objects and permanent monuments need not be on the ground located, although they may be. The natural object may consist of any fixed natural object, and a permanent monument may consist of a prominent post or stake firmly planted in the ground, or a shaft sunk in the ground.

Identifying claim. Whether the record calls were sufficient to identify the claim—*submitted* as a question of fact for the jury.

[3] **Annual labor—Resumption after year expired.** The statute requires $100 work on each claim located since May 10, 1872, in each year; but if, after the expiration of the year, before other rights attach in favor of relocators, the owner has resumed work and is actually engaged in developing his claim, he preserves his right to the claim.

Location by alien who sells to citizen. Where an alien has done all acts essential to a location and then conveys to a citizen who takes possession, such citizen takes valid title as against all persons having no rights therein prior to such conveyance.

Location by citizen and alien. Where a citizen and an alien locate a claim, not exceeding the amount of ground allowed to one locator, such location is valid as to the citizen, and a conveyance from both of such locators to a citizen passes a valid title.

A corporation organized under the laws of a State is a citizen, and entitled to purchase and hold a mining claim.

[1] *DuPrat* v. *James*, 4 Pac. R. 562.
[2] *McGinnis* v. *Egbert*, 5 Pac. R. 652.
[3] *Russell* v. *Brosseau*, 4 Pac. R. 643.

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[1] **Actual possession of a mining claim.** The purchaser of a mining claim properly located and marked on the ground, and who is by his agents engaged in working and developing the claim and in keeping up the boundary stakes and marks thereof, is not merely in the constructive possession of such claim—his possession is *a possessio pedis*, extending to the boundary lines of the claim.

This was an action in the nature of an action of trespass upon a lode mining claim in the Bodie mining district, California, in which the defendant pleaded title to the *locus in quo*.

The case was removed from the State court to the Circuit Court of the United States, where it was tried by a jury.

STEWART, VANCLIEF & HERRIN, for plaintiff.

R. M. CLARK and GEORGE B. MERRILL, for defendant.

SAWYER, J., in charging jury.

Gentlemen of the jury, I congratulate you that we are approaching the conclusion of this trial. It has run through many days, but has not been without interest.

The questions that have been presented are many, and some of them difficult; but the case has been thoroughly prepared. It has been zealously, exhaustively and ably tried and argued on both sides. Whatever great ability, great zeal, thorough preparation and a thorough knowledge of the subject is able to contribute, has been contributed to explain and illustrate this case. Science has also been called into exercise. You have had a glass model here, which shows you the internal condition of these mines. You have had another model which exhibits to your view the shafts, drifts, cross-cuts, veins and their connections in their proper location, and illustrates to you all the workings of the mines. You have had diagrams, also, exhibiting the same workings in that form, and everything, indeed, which could be desired to throw light on the subject, has been prepared and arranged and presented for your consideration and the consideration of the court.

Counsel having ably discharged their duty it now devolves on the court to state to you the law governing this case, and then it will be your duty, gentlemen, and your province, to

[1] *Funk* v. *Sterrett*, 59 Cal. 613.

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determine the facts. The questions of fact are for you to determine; the weight to be given to the evidence, the credibility to be given to the witnesses, and everything relating to a disputed question of fact, is for your sole consideration and determination. If I state the testimony I shall only do it for the purpose of calling your attention to it and stating its tendency; but I shall not go over it fully. If I intimate an opinion on a question of fact you are not to be governed by it, unless it corresponds with your own ideas as to what the facts are. If I make a mistake in stating the testimony or alluding to a fact you will correct it by your own recollection and judgment. I do not intend to express an opinion on the questions of fact where the testimony is in conflict. I shall state to you the law which governs this case, and it is your duty to take the law from the court.

There are questions here that are new and have never been determined before, so far as I am aware. Some of them, as stated before, are difficult; some I may not be entirely clear about; but I have reached certain conclusions on the questions of law that have been so ably argued, and those I shall state to you so far as I deem them applicable to the case, and you will take them from the court and be governed accordingly. Whether right or wrong, it is your duty to act on them as given by the court. If the court makes a mistake or an error of law, it is known where that error lies. It can be re-examined by the court on a motion for a new trial, or it can be taken to a higher tribunal where the error will be corrected. But if you disregard the law as given to you by the court and commit an error, it can not be known on what error you acted. Therefore there is no means of correcting your errors of law; but errors of fact may, perhaps, be corrected. You will, therefore, regard strictly the law as given you by the court, but you yourselves will determine the facts of the case.

Counsel on one side have presented a large number of instructions, and on the other side a less number. I have forty odd pages of instructions asked by one side. I shall not attempt to read these instructions. They are generally disconnected, and, even if correct, would serve rather to confuse than to illustrate. All, however, could not be given. I will state to counsel here that I shall only give such of their instructions as are covered by the general charge, and in my own

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language, as it will be delivered to the jury. In other respects, except as given in my own language, their instructions will be refused.

By an act of Congress which took effect May 10, 1872, all valuable mineral deposits, in lands belonging to the United States, were declared to be free and open to exploration and purchase by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law and according to the local customs or rules of miners in the several mining districts, so far as applicable and not inconsistent with the laws of the United States.

In order to acquire any right of location and purchase under this act, a party seeking to acquire such right must either be a citizen of the United States, or must have declared his intention to become such. If, therefore, Smith, or any other locator under whom plaintiff claims, was not a citizen, or had not declared his intention to become such at the time of making his location, he acquired no right, under the act, by virtue of such location. And whether Smith, or any other of such locators, was, at the time of his location, a citizen, or had declared his intention to become such, is a question of fact for you to determine from the evidence. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, and none others, are citizens of the United States. A person born in a foreign country, out of the jurisdiction of the United States, whose father is not a citizen of the United States, can only become a citizen by naturalization. The foreign born son becomes a citizen by being himself naturalized, or by the naturalization of his father during the minority of the son. If, therefore, Smith was alien born, it was necessary that he should be naturalized, or that his father should be naturalized during his minority, in order to make him a citizen. The statute for the purpose of acquiring a mining location, makes the affidavit of the party himself competent evidence of his naturalization. It is for you to determine the sufficiency of the evidence to establish the fact.

All the locations under which plaintiff claims were made since May 10, 1872; and at the time they were respectively made, the statute authorized a claim to be 1,500 feet in length along the vein or lode, and it was provided that "no claim

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shall extend more than three hundred feet on each side of the middle of the vein at the surface; nor shall any claim be limited by any mining regulations to less than twenty-five feet on each side of the middle of the vein at the surface."

In the absence, then, of any mining rule or custom *in force* at the time of the location, at the place where it is made, the location may extend to the distance of 300 feet on each side of the middle of the vein at the surface; that is to say the claim may be 1,500 feet in length along the vein, by 600 feet wide, including 300 feet on each side of the middle of the vein.

As I construe the statute, however, and so instruct you, by implication, the mines, by a rule, regulation or custom established and *in force* at the time and place of the location, may limit the width of the claim to 25 feet on each side of the middle of the vein at the surface. But such limitation to 25 feet on each side, to be valid, must be by virtue of a rule, regulation or custom, which has not only been established, but which is actually *in force* at the time of the location. The regulation must be in accordance, and not in conflict with, the laws of the United States and of the State of California; and the laws of California provide that, "in actions respecting mining claims, proof must be admitted of the customs, usages, or regulations established and *in force* at the bar or diggings embracing such claims; and such customs, usages, or regulations, when not in conflict with the laws of this State, must govern the decision of the action." This provision is still in force, except as far as its operation is limited by the act of Congress. One of the locations under which plaintiff claims was made November 10, 1875, and the claim was re-located December 15, 1876; each time 300 feet wide on each side of the lode; the notice in terms purporting to locate it under the act of Congress allowing such location. It is claimed by the defendant that there was, at the time of the location and re-location, a regulation in force in that district limiting the claim to 50 feet on each side of the vein, and that the location of 300 feet is therefore void. Now, whether there was or not such a regulation or custom *in force* at the time, is a question of fact to be found by the jury from all of the evidence in the case on that point.

The defendant, to show a regulation limiting the location

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to 50 feet on each side, introduced the minutes of proceedings of a miners' meeting in the district, held July 10, 1860, in which there is a rule making such limitation, and minutes of meetings held at various times subsequently, amending the rules but continuing this rule in force down to and including November 13, 1867, at which time the last action in respect to modifying the rules and regulations was had till December 30, 1876, which is after said location and re-location, and nine years after any meeting amending said rules. At said meeting of December 30, 1876, the miners declined to adopt the "United States mining laws," and no action upon the subject of rules is shown to have been since had by any miners' meeting.

The plaintiff, to meet this testimony, introduced the mining records of the district, from which it appears that from and including the year 1872, when the act of Congress referred to took effect, and thenceforth down to the year 1875, only one quartz location was made in the district, there being none in 1872, one in 1873, in which no width was specified, and none in the year 1874; that during the year 1875 eleven quartz locations were made, of which nine were made 300 feet wide on each side of the lode, and purported to have been made in pursuance of said act of Congress, and two only of 50 feet wide on each side, one of which two was marked on the record as abandoned; and during the year 1876 twenty-five locations appear to have been made, of which five were 300 feet wide on each side of the vein, one an extension of a 600 feet claim having no width mentioned, and the others 50 feet wide on each side, four of which being after the re-location by Lockberg. From this it is argued by plaintiff that quartz mining in the district was practically abandoned for several years, and no laws on the subject were practically in force; that on the return of the miners, and the revival of mining in 1875, the act of Congress had been passed, and the miners regarded that act as superseding the old laws on this point, and as authorizing the location of quartz claims 300 feet wide on each side, and in practice adopted and generally acquiesced in that rule, the rule limiting the claims to 50 feet, by common consent falling into disuse and ceasing to be in force. As held by the Supreme Court of California in commenting upon the provision of the

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State statute cited, "no distinction is made by the State statute between a 'custom' or 'usage,' the proof of which must rest in parol, and a 'regulation' which may be adopted by a miners' meeting and embodied in a written local law." This law does not, like a statute, acquire validity by the mere enactment, but from the customary obedience and acquiescence of the miners following its enactment. It is void whenever it falls into disuse, or is generally disregarded. It must not only be *established*, but *in force*.

"A custom reasonable in itself and generally observed will prevail as against a written mining law which has fallen into disuse. It is a question of fact for the jury whether the mining law is in force at any given time." It is for you, then, gentlemen of the jury, to determine whether this limitation to fifty feet was actually *in force* at the time the two locations 300 feet wide on each side were made. The fact that the rule in question was adopted and kept on foot in the laws for a considerable period of time would be *prima facie* evidence, nothing to the contrary appearing, that it was in force at one time, and, being once in force, a presumption would arise that it continued in force till something appears tending to show that it had been repealed, or had fallen into disuse and another practice been generally adopted and acquiesced in. The mere violation of a rule by a few persons only would not abrogate it, if still generally observed. The disregard and disuse must become so extensive as to show that in practice it has become generally disused. Now, gentlemen, whether, in view of there being few locations in this district during several years, and none in some, and of the passage of the act of Congress referred to, and the location, at first, after the revival of the mining interest in 1875, of most all claims, in pursuance of the provisions of the act, 300 feet wide on each side, if such be the fact, and in view of all the circumstances appearing in the evidence, it is for you to determine whether the fifty feet limitation had fallen into disuse, or was really *in force* at the date of the two locations in question. If it was *not* in force, then, in that particular, if otherwise valid, the location was good and valid to the full extent of 300 feet on each side of the vein. If the limitation was in force, then it was void as to the excess over fifty feet on each side of the vein, but valid to the extent of fifty feet and no more.

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The statute also provides, gentlemen of the jury, that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." So that no rights can be acquired under the statute by a location made before the discovery of a vein or lode within the limits of the claim located. A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz, or with some other kind of rock in place, carrying gold, silver, or other valuable mineral deposits named in the statute. It may be very thin and it may be many feet thick, or thin in places—almost or quite pinched out, in miners' phrase—and in other places widening out into extensive bodies of ore. So, also, in places, it may be quite or nearly barren, and at other places immensely rich. It is only necessary to discover a genuine mineral vein or lode, whether small or large, rich or poor, at the point of discovery within the lines of the claim located, to entitle the miner to make a valid location including the vein or lode. It may, and often does, require much time and labor and great expense to develop a vein or lode after discovery and location, sufficiently to determine whether there is a really valuable mine or not, and a location would be necessary before incurring such expense in developing the vein to secure to the miner the fruits of his labor and expense in case a rich mine should be developed. If, then, the locators of the East Noonday North, for example, discovered such a mineral vein or lode as I have described, however small, before the location of that claim, the location of the claim embracing within its lines the vein or lode so discovered was, in this particular, valid, otherwise not. The same observation would be true as to each of the other claims held by plaintiff.

I instruct you further, that if a party should make a location in all other respects regular, and in accordance with the laws, and the rules, regulations and customs in force at the place at the time, upon a supposed vein, before discovering the true vein or lode, and should do sufficient work to hold the claim, and after such location should discover the vein or lode within the limits of the claim located, before any other party had acquired any rights therein, from the date of his discovery, his claim would be good to the limits of his claim, and

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the location valid. So, also, gentlemen of the jury, where a party has made a location of a mining claim upon a mineral vein or lode discovered by him, in all respects valid, he is entitled to "have the exclusive right of possession and enjoyment of all the surface included within the lines of his location, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations." That is to say, if the plaintiffs or their grantors discovered a mineral vein or lode in the North Noonday claim, and made and have now in all respects a valid location of that claim, then they are not only entitled to the particular vein or lode so discovered and located in said claim, but to all other minerals, veins, lodes and ledges, throughout their entire depth, the top or apex of which lies inside of their surface lines extended vertically downward, to which no right had attached in favor of other parties at the time their location became valid, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of the surface location. If the plaintiff has a valid claim to 600 feet wide, then its right extends to all such veins or lodes, under the conditions stated, so within the surface lines bounding the 600 feet drawn vertically downward; and if the vein in question is one of the veins having its top or apex within such surface lines drawn vertically downward, its right extends to and includes that vein. If it has a valid claim to 100 feet wide, and only so much, then to such veins or lodes within the 100 feet lines.

The same principle and instruction applies to the Keystone and East Noonday North claims. If the plaintiff has a valid location to those claims, or either of them, then it is entitled to all the veins or lodes under similar circumstances, the apices or tops of which lie within the surface lines of such valid location or locations, extended vertically downward.

The next point to which I shall call your attention, gentlemen of the jury, is the location. To make a valid location under the statute it is required that "*the location* must be distinctly marked on the ground, so that *its boundaries can be*

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readily traced;" but the law does not define or prescribe what kind of marks shall be made, or upon what part of the ground or claim they shall be placed. Any marking on the ground claimed by stakes and mounds and written notices, whereby the *boundaries* of the claim located *can be readily traced*, is sufficient.

If the center line of a location of a lode-claim lengthwise along the lode be marked by a prominent stake or monument at each end thereof, upon one or both of which is placed a written notice, showing that the locator claims the length of said line upon the lode from stake to stake, and a certain specified number of feet in width on each side of said line, such location of the claim is so marked that the boundaries may be readily traced; and, so far as the marking of the location is concerned, is a sufficient compliance with the law. If, therefore, as the testimony tends to show, the locator of the North Noonday mining claim planted a prominent stake at a shaft sunk in the earth on a vein, lode or ledge, upon the northern side of which was placed a notice, stating that he claimed 1,500 feet on "this, the Noonday Quartz Lode," including all the dips, spurs, angles and feeders, together with 300 feet on each side; that said claim begins at a point in the center of a small shaft, about one fourth of a mile northerly from Queen Bee Hill, and extends thence in a northerly direction 1,500 feet to a post and mound, upon which is inscribed "Noonday Quartz Lode, Charles Smith's Northern Boundary," and erects such mound and stake at said northern boundary, and marks said inscription thereon, the location is distinctly marked on the ground, so that its boundaries can be readily traced within the meaning of the act, and is a compliance with the law in that particular. The same principle is equally applicable to the Keystone location, and to that of the East Noonday North.

There is testimony tending to show that the rule and custom of miners in Bodie district, at the time the several locations under which plaintiff claims were made, required mining claims to be recorded. If you find such to have been the rule or custom in force at the time, then a record was necessary, otherwise not.

In order to make a valid record, it was necessary for it to

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contain the name or names of the locator or locators, the date of the location, and such a description of the claim or claims, located by reference to some natural or permanent monument, as would identify the claim.

The natural objects or permanent monuments here referred to are not required to be on the ground located, although they may be; and the natural object may consist of any fixed natural object; and such permanent monument may consist of a prominent post or stake firmly planted in the ground, or of a shaft sunk in the ground. The record of each location of the North Noonday, Keystone, and East Noonday North, introduced by plaintiff in evidence, contained the names of the locators, the date of their location, and a description of the claim located, by reference both to a *shaft* and to stakes planted in the ground having notices of the location thereon.

If you are satisfied, from the evidence, that these records were in fact made (and there is no evidence to the contrary), and that the descriptions of the several claims located therein contained, by reference to the natural and permanent monuments mentioned, were such as would identify the claims with reasonable certainty, then you will find the records sufficient and valid in this particular; otherwise, insufficient.

As there has been much comment upon the record of the East Noonday North location, I think it proper to call your attention more particularly to it.

The record appears to be a copy of the notice placed on the claim, and would doubtless be so understood by a miner reading it for information. A person reading the record would be informed by it that the owners of the Noonday claim were the claimants, and that the claim was named the East Noonday North, probably with reference to the Noonday claim; that it was located on Silver Hill, a natural, well known object; that the claim commenced at a stake with a notice on it, of which the record is a copy, placed east of the Noonday shaft, which is a permanent object, having, as the testimony tends to show, already existed eight or ten years, and extended in a northerly direction from the stake 1,500 feet by 50 feet on each side.

There was, then, in the record a description of the location with reference to Silver Hill, a natural object, and the Noon-

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day shaft, a permanent object, and it is for the jury to determine whether a miner, seeking information from this record, could go to the permanent object—the Noonday shaft on Silver Hill—and thence east, and find the stake and notice pointing out the location on the ground with reasonable certainty. If so, the jury will be justified in finding that there is such a description of the claim in the record, with reference to some natural or permanent object, as to identify it, and that the location is valid in this particular. It was not necessary for the claimants to finally mark the location on the ground till after the record was made, and the testimony tends to show that the location was not fully completed till the next day after the record was made, when the locators planted this stake with the notice on the south line of the claim, and of the North Noonday claim 100 feet east of the Noonday shaft, with another at the northerly end, and that this became the final location on the ground, and which, the testimony tends to show, was ever after claimed, and subsequently surveyed, and stakes placed at the corners.

If the jury find that the location was at that time actually marked upon the ground by stakes and notices, so that its boundaries could be readily traced in the manner I before instructed you, was sufficient with reference to the North Noonday claim, then the location was sufficient in this particular also.

The testimony also tends to show that prior to any rights being acquired by the defendant, plaintiff's grantors, in addition to the lode line stakes set up at the location of their several claims, planted other stakes and monuments at the various corners of their claims, thus forming a parallelogram 1,500 feet long by 300 feet wide, including the Keystone, East Noonday North, and a portion of the original North Noonday claims, with a line of five stakes on each end of the parallelogram, and that they and the plaintiff renewed these stakes from time to time, as they were removed, until the work was commenced at the combination shaft, which has ever since been continuous to the present time; and it is claimed that if there was at the time of the location any defect in the marking on the ground, this additional marking, before any rights were acquired by the defendant, was clearly suffi-

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cient to validate these claims. In regard to this point, I instruct you, gentlemen, that a subsequent locator can not object that a prior location of a mining claim was not sufficiently marked on the ground at the time of its location, provided such prior location was sufficiently marked on the ground before such subsequent locator made any location or acquired any rights in such claim.

The testimony tends to show, and there is none to the contrary, that Smith did no work on the North Noonday within the year after he located it in 1875, and, supposing he had forfeited his claim, he procured Lockberg to re-locate it for him, and convey it, on December 16, 1876; that Lockberg did so re-locate it on that day and immediately conveyed it to Smith, who then, either alone or in connection with others interested with him, entered upon the claim and did sufficient work during the year to hold it for that year; and that Smith paid the recording fees, $15.

If these be the facts, and no other rights had in the meantime attached—and there is no evidence that any had attached—then, if the location made by Lockberg was otherwise sufficient and legal, and Lockberg and Smith were American citizens, Smith, by the several proceedings, had acquired a valid right to the claim.

The statute requires $100 in value of work to be done on each claim located after May 10, 1872, in each year, in order to hold it; and, in default of such work being done, authorizes the claim to be re-located by other parties, provided the first locator has not resumed work upon it. But if the first locator resumes work at any time after the expiration of the year, before other rights attach in favor of re-locators, he preserves his claim.

The statute nowhere authorizes a person to trespass upon or to re-locate a claim, before properly located by another, however derelict in performing the required work the first locator may have been, provided he has returned and resumed work, and is actually engaged in developing his claim at the time the second locator enters and attempts to secure the claim.

It is urged by defendant that Smith was not a citizen, and therefore that he could acquire no right by location. In view

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of this claim, and in case you find from the evidence this to be the fact, I give you this further instruction:

The testimony shows that Smith, at various times, before defendant acquired any interest, conveyed portions of whatever right he had to other parties next hereinafter named, and finally, on September 28, 1878, conveyed all his remaining interest in all of the claims, by specific description, to said parties, Irwin, John and James Welch and Patrick Clancy, in whom whatever interest had before been acquired, by virtue of said several locations, at this time had become vested.

If Smith, even though not a citizen, performed all the acts necessary to make a valid location, and did the work necessary to keep his claim good, had he been a citizen, until he conveyed to Irwin and others; and if Irwin and his co-grantees were citizens, and after the conveyance to them took possession and control, and kept up the monuments and markings, and performed the necessary conditions to keep the claims good, then they acquired a good and valid right to the claim, as against defendant, from the date of the conveyance to them, provided that no other rights had attached in defendant's favor prior to such conveyance to them, and such subsequent performance of the said required conditions by them.

The East Noonday North claim was located by Welch, Smith and Irwin, November 27, 1877, before any rights had been acquired by the Orient company, defendant. The claim contains no more than one man was authorized to locate. So that, if one or more of the locators were citizens, in that particular the location of the claim was good as to such citizen or citizens, even though one or more of the others were aliens and not entitled to locate. If, therefore, one or more of these locators were citizens, and the claim was in other particulars well located, and the proper conditions performed to hold the claim till the subsequent conveyance to plaintiff, November 20, 1878, a good title thereto, as against defendant, passed to the North Noonday Company, plaintiff, by that conveyance.

The North Noonday Mining Company, plaintiff, is a corporation created and existing under the laws of California, and is therefore to be deemed a citizen within the meaning of the statute, and as such is competent to purchase and hold a mining claim. Irwin, the Welches and Clancy, as locators of the

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East Noonday North, and grantees of Smith of the other claims and of his interest in the East Noonday North, held all the interest in all said claims acquired by the various proceedings in question, and so holding such interest on November 20, 1878, conveyed all their interest in all said claims to the North Noonday Mining Company, plaintiff, which thereby became vested with all the interest that could be acquired by virtue of said transactions. If, therefore, the grantors of plaintiff had performed all the acts necessary for a citizen to perform in order to locate and hold said several claims down to the date of said conveyance, and the said plaintiff took possession and control of said several claims upon receiving said conveyance, and thereafter kept the said claims properly marked on the ground and performed all the conditions necessary to maintain their said claims, then said plaintiff acquired a good title to such of said claims as were so properly in form located and kept up as against said Orient Mining Company, defendant, provided said defendant acquired no rights in said claims, or any of them, prior to the acquisition of said interest by said plaintiff through said conveyance, and such subsequent acts of said plaintiff to preserve their rights to said claims, even though one or more of said original locators should be found not to have been citizens, and, on that ground, incompetent to acquire any title under said act of Congress.

The testimony tends to show various work done on the several claims by the claimants, Welch, Smith and others, during 1877 and 1878, claimed by plaintiff to be sufficient to hold the claims; that Welch, in August, 1878, placed a line of mounds and stakes on each end of the several claims, 50 feet apart, for a distance of some 300 feet, by way of indicating the corners and end lines; that Anderson, on October 19, 1878, measured off the claims and again set stakes according to the proper measurements; that these stakes being four inches square, three and one half feet high, painted white, and marked so as to indicate the corners and lode line of the said claims, were found there by Scowden when he finally surveyed the claims in the following spring and located the shaft.

The testimony further tends to show, and as to this part of the testimony I believe there is none to the contrary—if there is, any of you will remember it—that the interest in all the

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three claims having been concentrated in the plaintiff, the North Noonday Mining Company, in the preceding November, the plaintiff in March, 1879, before any other parties had entered upon these claims or made any claim thereto, located and made arrangements to sink a three compartment shaft, known as the combination shaft, for the benefit and to be used for the development of all the claims, and also the Noonday claim to the south; that machinery and supplies were at once collected and brought upon the ground for the purpose of sinking said shaft, and developing and jointly working all said claims; that from that time on the plaintiff, by its agents and servants, was actually on the ground erecting machinery and buildings, exercising acts of ownership and dominion over the claims, claiming title to the whole; that the plaintiff commenced sinking the combination shaft on or about April 5, 1879, and from that time to the present has been, by its agents and servants, actually on the ground, constantly and vigorously prosecuting the work of developing and working the mines claimed by them, and constantly exercising dominion over them; that by June first, buildings and machinery had been erected and brought upon the ground, and supplies collected to the amount of more than $30,000.

If you find these to be the facts, gentlemen of the jury, then there was not at this time merely a constructive possession of these mining claims by virtue of the mining laws alone, but an actual occupation and possession, a *possessio pedis*, a physical presence of the plaintiff by its officers, agents and servants, actually controlling and dominating the claims as early, at least, as the month of March or April, and the domination and possession extended to the bounds of the claims as described in the conveyance to plaintiff, under which it claimed title, and as indicated by the stakes planted by Anderson and found by Scowden to mark the location, and the notices stating the extent of the claims—the claims lying, the testimony tends to show, in one body, and conveyed by one deed to the same party, and being developed by the same means as a part of one general system. If, therefore, you find from the evidence that the plaintiff acquired and maintained a valid location to all or any of these claims in question by the means in these instructions before indicated, and performed the acts of

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possession just supposed before any right had accrued to the defendant, then, as to such claim or claims, the plaintiff had, as against the defendant, both a good title and rightful possession at the time the trespasses are alleged to have been committed, and when it is conceded that the defendant actually entered and committed the acts complained of; and you will find for the plaintiff on those points.

If you find title and rightful possession in the plaintiff, as just indicated, as to all or any of said mining claims, you will then inquire whether the vein or lode in question which the defendant cut in the head of the winze at the end of its cross-cut, called by defendant, Orient Lode No. 3, is one of the veins or lodes discovered in any of the claims, the right, title, and possession to which you find to be in the plaintiff as against defendant; and if you find that is one of such veins or lodes, or if you find that it is not one of those lodes, but that it has its apex or top within the side lines of any such claim, the title and possession to which you so find to be in the plaintiff, drawn vertically downward, then, in either case, it belongs to the plaintiff, and your verdict will be for the plaintiff. But if you find that said vein or lode, so cut by defendant, is not one of the veins or lodes discovered within any claim the title to which you find in the plaintiff, and that its apex or top is not within the side lines of any such claim of plaintiff drawn vertically downward, but is a separate, independent vein, every part of which lies to the eastward, or outside of and beyond any claim the title to which you find to be in plaintiff, and no part of the apex or top of which is within the side lines of such claim, drawn vertically downward, then it does not belong to plaintiff, and your verdict will be for defendant.

If you find for the plaintiff, gentlemen, you will then inquire what the damages are. The testimony on the question of damages is that about fifty-five tons of ore have been taken out, and I think the testimony is that it is about $25 or $30 per ton in value. The damages will be the value of the quartz removed; at all events, if you can not agree on the damages, they are entitled to nominal damages, say one dollar.

If you find for the plaintiff, your verdict will be:

"We, the jury, find for the plaintiff, and assess the damages at so many dollars."

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If, on the other hand, you find for the defendant, your verdict will be:

"We, the jury, find for the defendant."

The verdict of the jury was for the plaintiff, with one dollar damages.

MILLER ET AL. v. TAYLOR ET AL.

(6 Colorado 41. Supreme Court, 1881.)

It is an elementary rule that no man may profit by his own wrong, and he that prevents the doing of a thing may not complain of its non-performance.

Mandatory injunction—[1] Location prevented by means of forcible ouster. Upon bill for a mandatory injunction, restoring possession under the Colorado statute covering cases where a party has taken forcible possession of a mining claim, where plaintiffs had been prevented sinking their discovery and completing their location on account of their workings having been taken from them by defendants: *Held*, that the wrongful acts of defendants excused the sinking and other acts of location on part of plaintiffs.

Discoverer adopting location of his ejector. A discoverer wrongfully ousted by a wrongdoer, may adopt as his own the survey and location perfected by the party who drove him out of the possession.

Judgment on referee's report. The rule that a judgment will not be disturbed unless manifestly against the weight of evidence, does not obtain where the testimony has been taken before a master or referee.

Appeal from the District Court of Lake County.

The opinion states the facts.

G. G. WHITE and J. W. MULLAHEY, for appellants.

J. Q. CHARLES, H. C. DILLON and M. J. FORHAN, for appellees.

ELBERT, C. J.

This action was brought under the provisions of Sec. 10, Chap. XLVIII, General Laws. By that section the

[1] *Erhardt* v. *Boaro*, 113 U. S. 527.

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district court is clothed with power to issue "writs of injunction for affirmative relief, having the force and effect of a writ of restitution, restoring any person or persons to the possession of any mining property or premises from which he or they may have been ousted by fraud, force or violence, or from which he or they are kept out of possession by threats or by words or actions which have a natural tendency to excite fear or apprehension of danger, or whenever such possession was taken from him or them by entry of the adverse party on Sunday or a legal holiday, or while the party in possession was temporarily absent therefrom." General Laws, 510.

The plaintiffs, by their complaint, asked to be restored to the occupancy and possession of the "Venture lode," of which they allege the defendants had dispossessed them by fraud, force and violence, and by threats of shooting and killing.

A demurrer, interposed by defendants to the complaint, was overruled by the court, and this is assigned as error.

In support of this assignment it is urged that the complainant does not show a compliance with the statutes respecting the location, marking and recording of mining claims.

(1.) That it does not allege that a discovery shaft was sunk upon the lode "to the depth of at least ten feet from the lowest point of the rim of such shaft at the surface."

(2.) That it does not allege that the surface boundaries were marked by the locators as required by law.

It is an elementary principle that the law permits no person to profit by his own wrong.

The rule that he who prevents a thing being done shall not avail himself of the non-performance he has thus occasioned, is but an application of the general principle: Broom's Leg. Max., 279, 282.

The complaint alleges that on or about the 29th day of April 1879, certain of the plaintiffs entered upon the premises described, "explored the same and discovered the outcrop and apex of a body of mineral-bearing rock in place, and thereupon proceeded to sink a discovery shaft to a depth of ten feet below the lowest part of the vein at the surface, thereby to remove, disclose and expose a well-defined vein of mineral rock in place, which was not previously known to exist, the

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same being a gold and silver bearing vein, and other precious metals.

"And thereupon, and upon said day, they posted at said point of discovery a plain sign or notice, containing the name of the lode, to wit: 'The Venture lode,' the names of the locators, to wit: Alexander McArthur, James T. Rawlings, Sidney Goldsborough and Lewis C. Goldsborough, and the date of discovery, to wit: April 29th, A. D. 1879.

"That on the 20th day of May, A. D. 1879, as they were proceeding to and actually sinking their discovery shaft to a depth of ten feet from the lowest part of the rim at the surface, they having sunk the same at that time to a depth of seven feet, the said defendant, aided and assisted by one Charles Stanton, who represented himself as a deputy sheriff and authorized by law to eject said locators, he and said plaintiff being aided and abetted by others whose names are unknown to plaintiffs, and all being heavily armed with revolvers, did, by fraud, force and violence, and by threats to shoot said locators should they refuse to cease working on said discovery shaft, oust, and drive them from said discovery shaft, and have ever since, by threat to shoot and kill said locators and said plaintiff, M. J. Forham, prevent and intimidate them from entering upon said premises or further sinking their discovery shaft on said premises.

"That by threats of shooting and killing said locators for entering upon said premises, the said defendants prevented and deterred said McArthur, James T. Rawlings, Lewis C. Goldsborough and Sidney Goldsborough, from entering in or upon said premises for the purpose of marking the surface boundaries of said Venture lode with six substantial posts as required by law."

The demurrer admitted the truth of these allegations, and they sufficiently explain why the shaft was not sunk the statutory depth, and the boundaries marked as required by law.

Having ousted the plaintiffs of their possession before the expiration of the time within which these statutory requirements were to be complied with, and having prevented a compliance by threats to shoot and kill, the law would be weak indeed did it permit them to allege a non-performance, occasioned by their own illegal conduct.

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The same considerations apply to the objections made to the certificate of location.

The complaint alleges: "That after ousting said locators, the said defendants, in the absence of said locators, fraudulently and by force and violence proceeded to sink a discovery shaft on said premises, and marked the boundaries of said Venture lode by six substantial posts, hewed on the sides in toward the claim and sunk in the ground, one at each corner and one at the center of each side line, each stake being marked and indicating the position it occupied and the place it marked on the boundary of said claim; and while said locators were prevented from surveying said boundaries or otherwise marking them, by the threats and violence of said defendants and their employes, said defendants did cause to be made out and recorded in the office of the clerk and recorder of deeds of said Lake county, a location certificate of said 'The Venture lode,' containing the name of the lode, to wit: 'The Venture,' the names of the pretended locators, to wit: Amos G. Miller, Hart Sherwood, Milton Charles and L. G. Smith, the date of their supposed discovery, the date of their supposed location, etc.

"And thereupon, and as soon as it was possible for them so to do, the said Alexander McArthur, James T. Rawlings, Sidney Goldsborough and Lewis C. Goldsborough, accepted and adopted the marking of the boundaries of said claim so by said defendants made, and the description by them in the certificate of location so inserted and filed in the office of the recorder of deeds of said Lake county, a location certificate for said 'The Venture lode,' containing the name of the lode, to wit: 'The Venture;' the names of the locators, to wit: Alexander McArthur, James T. Rawlings, Sidney Goldsborough and Lewis C. Goldsborough; the date of discovery, to wit: April 29, 1879; date of location, to wit: the 1st day of July, A. D. 1879, and the number of feet in length claimed on each side of the discovery shaft; and the said Venture lode was, when thus located and marked, of the following size and dimensions, to wit: 1,500 feet in length by 300 feet in breadth."

We see no good reason why the plaintiffs might not, under the circumstances, adopt the survey and marking of the lode by the defendants as their own.

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However this may be, it is enough that whatever infirmity attaches to the certificate of location grew out of the illegal conduct of the defendants, and they are precluded from urging it.

The demurrer was properly overruled.

The second and third assignments resolve themselves into the proposition that the findings and decree of the court below are not warranted by the evidence.

The testimony in this case was taken before a referee, and the rule that a decree or judgment will not be disturbed unless manifestly against the weight of evidence, does not obtain.

The opportunity which the jury or the *nisi prius* court, where the trial is to the court, has to judge of the credibility of witnesses by their appearance on the stand, and the general manner of testifying, supplies the reason for the rule.

Where the testimony of witnesses is taken before a master or referee, no such opportunity is afforded, and the rule ceases with the reason for it.

It becomes our duty in such case to examine the entire record, sift and weigh all the evidence with a view to a just determination, uninfluenced by the proposition that the court below had superior opportunities to judge of the credibility of witnesses: *Jackson* v. *Allen*, 4 Colo. 268.

As is usual in cases of this character there is much conflict of testimony. This conflict chiefly concerns the disposition made of the mining claims called the "Venture" and "Immense" lodes on the 29th of April, 1879.

The answer of the defendants concedes that prior to that date the two claims named were held by McArthur, Rawlings, Sidney Goldsborough, Lewis C. Goldsborough, Miller and Sherwood, in common, each owning an undivided one sixth interest. Upon the 29th of April the defendants allege an exchange upon the part of Miller and Sherwood of their interest in the Immense lode, for the interest of McArthur, Rawlings, S. and L. C. Goldsborough, in the Venture lode.

Having conceded the original interest of the plaintiffs named, it was for the defendants to show the alleged exchange by a preponderance of testimony. This they have failed to

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do; on the other hand, we think, there is a clear preponderance of evidence in favor of the claim made by the plaintiffs, that, at the date named, the agreement was that the plaintiffs should do the assessment work on the Immense and the defendants the assessment work on the Venture.

Again, the admitted facts of the case show that the Venture lode was much the more valuable lode of the two, and so known and thought to be, by reason of assays at the date of the alleged exchange. The theory of the defendants, therefore, is not a little embarrassed by the improbability which attaches to it. It is possible that the plaintiffs exchanged a two sixth interest in a valuable mine for a one sixth interest in one much less valuable, but it is scarcely probable; such an unequal transaction would need explanation. The explanation offered by the defendants is, that the assessment work had been done on the Immense lode at the date of the exchange. This is not supported by the record. So far as we have been able to ascertain but little work had been done at the date of the alleged exchange.

Respecting the allegations of force and fraud, we think it sufficiently appears that the defendants employed both in gaining possession of the mine.

A careful examination of the record leads us to believe that the decree of the court below is supported by the weight of evidence, and did substantial justice between the parties.

It is therefore affirmed.

IRON SILVER MINING CO. v. CHEESEMAN ET AL.

(2 McCrary, 191. U. S. Circuit Court, District of Colorado, 1881.)

LIME LODE V. SMUGGLER LODE.

[1] **What a mining location covers—Apex—Dip—Lode in place.** The law provides that upon a location properly made the claimant shall have the vein upon which the location is made, and all other veins and lodes having their top or apex within the lines of the location; and not only

[1] *Crœsus Co.* v. *Colorado Co.*, 19 Fed. 78; *Iron Co.* v. *Murphy*, 1 M. R. 548; *Pardee* v. *Murray*, 4 Mont. 234.

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within the body of the claim within the lines of the location, but beyond those lines as far as the vein or lode may, in its descent into the earth, pass beyond those lines and within the end lines of the location. But such vein or lode must be *in place*.

[1] **Vein, lode or ledge, defined—Existence of, a question of fact.** *Vein, lode and ledge* are the words used in the statute to designate a mineral deposit in rock, and are supposed to be nearly synonymous in meaning. A vein or lode is a body of mineral or mineral-bearing rock within defined boundaries in the general mass of the mountain. The existence of such vein or lode is a question of fact to be found by the jury from the evidence before them.

Continuity of ore body—Lode not "in place." If the ore body is continuous, to the extent that it may maintain that character it is in place—whether deposited in that form, or moved to its position bodily with its inclosing walls. Whether the vein is thick or thin is not material, so it is continuous. But if the territory is so broken up, jumbled and mixed, the several parts together, that there is nothing continuous, there is no lode *in place*.

In 1874, A. B. Wood located the Lime lode and mining claim, situated in Lake county. The location was made upon a body of mineralized limestone, not upon a lode or vein, as defined by statute. In 1877, upon proceedings had, a patent was issued for the claim to its owners. In the fall of 1877 George Nyce and others located what they called the Smuggler claim and lode. It was situated to the east of and adjoining the Lime, and before locating it the discoverers sunk a shaft to the depth of forty feet, and at the bottom found a large body of mineral. After the location of the Smuggler its owners commenced running inclines and drifts, and in them also developed a considerable body of mineral. After the discovery of the mineral in the Smuggler claim, the owners of the Lime ran inclines from the Lime claim into and upon the Smuggler claim, and connected them with the Smuggler workings. Thereupon the Iron Silver Mining Company, which previously had purchased the Lime claim, commenced their action against defendants, who had become the owners of the Smuggler, to eject them from the body of mineral they had discovered and developed within the Smuggler location, claiming that it was the lode or vein of mineral which had its apex within the Lime claim. This the Smuggler owners disputed, claiming that there was no vein or lode within the Lime ground; that whatever mineral was there was not in place, but

[1] *Harrington* v. *Chambers*, 1 Pac. R. 362.

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had been removed to that point from some other locality, and that it was found in a formation so broken and jumbled that there was neither foot nor hanging walls to it. It was upon this disputed question of fact that the trial was had, and the instructions of the court were directed to its elucidation, and were as follows.

G. G. SYMES and JONAS SEELYEE, attorneys for plaintiff.

MARKHAM, PATTERSON, THOMAS & CAMPBELL, and J. B. BELFORD, attorneys for defendants.

HALLETT, District Judge.

I presume, gentlemen, that you feel some relief that you are approaching the time when you will be relieved from the consideration of this case. You have given careful attention to the evidence produced, and I presume that you are disposed to give it the consideration which the importance ascribed to the case by the parties seems to demand.

If we are to believe some of the witnesses who have testified here, the property is of very little value indeed. But the elaborate preparations that have been made for the trial of the case seem to contradict that statement. At least the opinion of the parties must be that the claim is of some value, and it seems to me that perhaps the value may be—I do not state this as matter that is of any importance in your consideration of the case—but perhaps the value of it may be in the minds of the parties as relating to other territory which may lie to the east of it. Whoever may triumph here on the principles which have been recognized in respect to these lodes, it is possible that other controversies may arise in respect to other territory lying to the east of both claims.

And as to that matter, whether it is true or not, it is not very important which one of these parties shall succeed in this controversy.

Something of an appeal was made to you by counsel as to the wrong that would be done if either of these parties should be encouraged to maintain the view that this lode may be pursued beyond the side line of the claim.

Whichever of these parties may triumph, it is possible that that view may be asserted by the successful party hereafter,

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against other parties who are not involved in this controversy. But all that is of no importance here, nor is it matter for your consideration at this time.

While adverting to matters which are not important for consideration, I may with propriety mention some other matters.

It is not a question of any importance whether this claim is or is not a valuable one. It is the purpose of the law to decide all controversies on the same principles, and by the same rules, whatever values may be involved. Perhaps, as we are constituted, it may not be possible to exclude from our minds all consideration of the importance of a controversy in determining it, but we ought to do so. Everybody in the administration of the law should do so, for that is the method of the law, and the way in which we should proceed to the determination of every question which may arise between parties. We should determine it upon a principle and by a rule which may reach everybody and apply to all, without reference to the circumstances that may be in issue in the case which is under consideration. And in that view, it is not a matter of importance whether one or the other of these parties is entitled to sympathy or to a more favorable consideration than the other; nor is it a question whether one or the other of the parties is a corporation. Some allusion has been made by counsel, as I think, improperly, to the fact that one of these parties is a corporation. It has been said the power of corporations is growing in this country, and becoming oppressive, particularly that of railroad corporations and telegraph companies—and perhaps we may concede some of these things. But whether we do so or not, we should not make any different rules for corporations than those which apply to individuals, in the courts, at least until the law shall authorize us to do so; not until competent authority shall say that there shall be one rule for corporations and another for individuals.

Another matter which is not of any importance in the consideration of the case, is the varying surveys of the Lime location. You remember that some of the witnesses testified that surveys have been made since the first location of the claim which do not coincide with that which was first made. As to the matters here presented for your consideration, that is not a question of any importance in this suit. Probably the plaint-

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iff is confined to the monuments originally located. If it be true, as stated by some of the witnesses, that the Lime was first located further to the west, the plaintiff would be confined to that territory, if an issue should be made upon that point. But the issue here is as to the whole of this claim, and there is no testimony showing the existence of a difference in the condition of the ground, or of the existence of a lode or vein, if any does exist, in the part which is included in the last survey and not in the first; that is, the small strip of territory along the east side of the claim which may have been included in the last survey, but not in the first. So that is not a matter of any importance.

Of course there has been considerable said by counsel on both sides upon other matters, as to ability of counsel and good sense and character and personal relations, which have nothing to do with the case. I suppose it is hardly necessary to mention that.

Now, as to the matters which are in issue between the parties, you have observed that there is no conflict upon the surface of the ground, except perhaps it may be as to the small strip along the east side of the Lime claim, and the west side of the Smuggler claim, as to which there may be conflicting surveys, and which I have stated to you is of no importance in this suit. There is no conflict upon the surface of the ground. The plaintiff, by patent from the government issued to persons who located the claim, holds the absolute title to what has been described before you as the Lime location, and we may say that as to the surface and all that rightfully goes with the surface, the plaintiff is the absolute owner of that territory. We may say, also, that as to the Smuggler location, these defendants, although they have not a government title, a title by patent, are the owners of the surface and all that rightfully goes with the surface of the Smuggler location so that we have no controversy upon that point.

The law provides, that upon a location properly made, and whenever patent has been issued, we assume in all controversies between individuals that the location is properly made. The law provides, that upon a location properly made, the claimant shall have the vein upon which the location is made, and all other veins and lodes having their top or apex in the territory within the lines of the location, and not only within the

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body of the claim within the lines of the location, but beyond those lines as far as the vein or lode may, in its descent into the earth, pass beyond those lines and within the end lines of the location. Now, upon that, plaintiff here claims that the lode in controversy, or ground in controversy, if there is a lode in it, originates in its territory by its top and apex, and descends upon its dip through and under the other claim. And they have sought, by numerous witnesses and elaborate preparation, to maintain that view before you. And the question, as it is presented to my mind, is a very simple one. Upon that I have written something here for your instruction, which I will read.

Whether in the ground in controversy there is a vein or lode bearing silver within the meaning of the act of Congress, is the principal question in this case. The words used in the statute to designate a mineral deposit in rock in place are *vein*, *lode* and *ledge*, and these are supposed to be nearly synonymous in meaning. However these words may differ in meaning, it is not important in this case to look for a distinction between them. Nor is it important to define their meaning in a manner that may be accepted in all cases. Any effort so to define them would probably result in failure, but we must seek for a meaning which will enable us to reach a conclusion in this case. So proceeding, it is enough to say that a vein or lode is a body of mineral or mineral-bearing rock within defined boundaries in the general mass of the mountain. This is a sufficient description, certainly, as to all bodies of ore that may be found within the lines of the location. As to what may be found in the body of the claims, there being no conflicting location, it is not very important to consider whether it is in place. But the statute, giving the right to pursue the lode beyond the lines of the location in a downward course, refers to veins or lodes *in place*, and whenever such right may be claimed or asserted, it is important to consider whether the vein or lode, or that which may be alleged to be such, is *in place* within the meaning of the act of Congress.

And, first on that point, it may be said that if the ore body is continuous to the extent that it may maintain that character, it is in place. So far as the ore body is continuous, it must have been deposited in that form or removed bodily, and with its inclosing rocks, to the place in which it may be found.

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And in either case, as to such continuous ore body, it is proper to say that it is in place within the meaning of the act. And this is the point in controversy between the parties. You will remember that the witnesses for the plaintiff unite in saying that the ore extends with more or less uniformity, and that it is practically continuous from the plaintiff's claim into and through the defendants' claim, so far as it has been explored. The plaintiff produced assayers to testify that samples of ore were taken from all parts of the vein, and found to contain silver and lead. The maps put before you by plaintiff to show the condition of the ground give the vein as extending from one claim to the other; and clearly that is the position assumed.

On the other hand, defendants contend that the ground in controversy is so broken, and the several parts so intermingled, that there is not, and can not be, a body of ore extending for any considerable distance through any part of it. They have many witnesses to testify to that condition of the ground. They concede that in the ground in controversy there are detached fragments, particles, and perhaps masses of ore intermingled with the country rock in the like fragments, particles and masses. But they deny that there is anything like a continuous body or sheet of ore extending from one claim to the other. And this is the question in issue. It is pretty nearly a direct issue between the witnesses for the plaintiff and the witnesses for the defendants, and, as you give credit to one party or the other, you should find the fact.

I don't think that I can in any manner make it clearer to you.

I have to say, also, that the burden of proof is upon the plaintiff by a preponderance of testimony to establish the facts which are necessary to support a finding in its favor; and the fact mainly in issue, as I have stated to you, is: What is the condition of this ground extending from one of these claims into the other?

A good deal has been said by the witnesses as to whether there is a top or apex of the vein. That depends, gentlemen, very much as to whether there is any vein or lode there. If you find that there is a vein or lode, to my mind the evidence is clear enough that the top of it is in the Lime location; and if there is none there, of course that which does not exist does

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not exist in any part—it does not exist by its top nor by its bottom, nor anywhere between the two points.

So that it is, gentlemen, a question of the credibility of witnesses. The testimony is strongly conflicting—I don't think I have ever known a case in which it was more so—and, as I have said, the question is as to which one of these theories you will accept.

Now, I ought to say to you further, that as to this ore body that I have spoken of, whether it is of greater or less extent —that is, whether it is very thin or very thick—is immaterial. If it extends, as claimed by the plaintiff, from their claim to and into the other, the strength of the vein is not material. Their position is, as you remember, that it extends all the way from their claim to and into the other so far as it has been explored, and it is not material whether it is strong or weak, if it extends in the manner described by them.

But if the territory is, as claimed by the defendant, so broken up, jumbled and mixed, the several parts together, that there is nothing continuous, of course there can be no lode extending from one claim to the other.

1. Denouncement is "the formal declaration of discovery," under Mexican law: *U. S.* v. *Castillero*, 2 Black, 286.

2. Lode location must cover apex of the vein: *Iron Co.* v. *Murphy*, 1 M. R. 548; *Flagstaff Co.* v. *Tarbet*, 98 U. S. 463; *Post* LODE; *Wolfley* v. *Lebanon Co.*, 4 Colo. 112; *Post* SIDE LINES.

3. Discovery must precede location: *Orerman Co.* v. *Corcoran*, 1 M. R. 691.

4. A vague entry of lands is not absolutely void; the defect may be supplied by a survey: *Johnston* v. *Shelton*, 4 M. R. 308.

5. The locator becomes the exclusive owner of his claim, to the exclusion of others prospecting: *Atkins* v. *Hendree*, 2 M. R. 328.

6. Possession of part is possession of the entire location: *Attwood* v. *Fricot*, 2 M. R. 305. *English* v. *Johnson*, 17 Cal. 108; *Post* POSSESSION.

7. Possession extends to the stakes set: *Boardman* v. *Thompson*, 6 M. R. 240.

8. Staking, alone, does not complete a location: *Golden Fleece Co.* v. *Cable Co.*, 1 M. R. 120.

9. Effect of misdescription in location notice: *Johnson* v. *Parks*, 4 M. R. 316. In location certificate: *Pollard* v. *Shively*, 2 M. R. 229; *Russell* v. *Chumasero*, 4 Mont. 309.

10. Notice as parcel of the location: *Kelly* v. *Taylor*, 5 M. R. 598; *Phillpotts* v. *Blasdel*, 4 M. R. 341.

11. A citizen may locate by agent: *Murley* v. *Ennis*, 2 Colo. 300; *Post* PROSPECT. CONT.

12. Ground covered with tailings may be located for the sake of the tailings: *Rogers* v. *Cooney*, 7 Nev. 213; *Post* TAILINGS.

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13. Reasonable time allowed discoverer to perfect location: *Murley* v. *Ennis*, 2 Colo. 300; *Post* PROSP. CONT.; *Patterson* v. *Hitchcock*, 5 M. R. 542.

14. Re-location of lode with change of name: *Phillpotts* v. *Blasdel*, 4 M. R. 341.

15. The terms "location" and "mining claim" defined: *St. Louis Co.* v. *Kemp*, 104 U. S. 636; *Post* PATENT.

16. A single patent may issue upon several placer locations: *Id.*

17. Boundaries sufficiently marked, when so indicated as to make themselves known as the result of honest search: *Eilers* v. *Boatman*, 1 West C. R. 632.

18. Slight differences in the measurement and courses between the location and the patent survey, do not vitiate the original record: *Id.*

19. The location of a vein on its apex will not be defeated by the secret possession of parties tapping the vein below on the dip: *Id.*

20. As between two alleged discoverers one can not invade the actual possession of another to make a location: *Eilers* v. *Boatman*, 1 W. C. R. 632; *Weise* v. *Barker*, 2 Id. 108; *DuPrat* v. *James*, 3 Id. 651; *Cowell* v. *Lammers*, Id. 504. Compare *Sweet* v. *Webber*, 7 Colo. 443.

21. A statute dispensing with the necessity of stakes on inaccessible ground will not be made to apply to ground merely difficult of access: *Crœsus Co.* v. *Colorado Co.*, 1 W. C. R. 451.

22. The locator can not change his lines to the injury of an intervenor: *Id.*

23. Boundaries must be marked: *Funk* v. *Sterrett*, 59 Cal. 613.

24. Where a location is imperfect, the possession which will supply its place against a wrongdoer, must be the actual *pedis possessio*: *Id.* Compare *Sweet* v. *Webber*, 7 Colo. 443; *Hopkins* v. *Noyes*, 4 Mont. 550, and *Noyes* v. *Black*, Id. 527.

25. Laws regarding location must not conflict with the congressional act: *Johnson* v. *McLaughlin*, 3 W. C. R. 178.

26. Notice claiming time to stake boundaries not valid: *Newbill* v. *Thurston*, 3 W. C. R. 367.

27. Stakes are sufficient boundaries: *DuPrat* v. *James*, 3 W. C. R. 651.

28. Facts held to be sufficient evidence of location: *Newbill* v. *Whitfield*, 63 Cal. 81.

29. The four requisites to complete location stated, to wit: (1) discovery shaft; (2) posting notice; (3) staking boundaries; (4) record: *Strepey* v. *Stark*, 7 Colo. 614.

See ALIENS, CLAIM, LOCATION CERTIFICATE, LODE, RE-LOCATION, RECORD, SIDE LINES.

30. Discovery shaft sunk on the patented claim of another will not avail as a valid monument of location: *Upton* v. *Larkin*, 6 Pac. R. 66.

31. Change of boundaries such as to exclude discovery shaft avoids claim: *McGinnis* v. *Egbert*, 5 Pac. R. 652.

32. Mining claim defined: *Williams* v. *Santa Clara Co.*, 5 Pac. R. 85.

33. Amended location certificate relates back to original location: *McGinnis* v. *Egbert*, 5 Pac. R. 652.

34. The discovery of mineral after location before adverse rights intervene relates back to date of original location: *Id.*

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KRAMER V. SETTLE.

(1 Idaho, 485. Supreme Court, 1873.)

[1] **Res gestæ—Declarations of locator.** The declarations of the locator of a mine, made long after the time of the location, are not of the *res gestæ;* declarations to be *res gestæ* must be part of an act, or made while such act was being performed.

Certified copies of instruments recorded are admissible in evidence without proof of the execution of the originals.

Local statute as to proof of right to record. When a location notice is filed in the names of several persons as co-locators it will be presumed that the recorder had not filed it without the statutory proof required by section 5 of the Idaho Mining Act.

[2] **Annual labor done outside of claim.** The court below was requested to instruct the jury that "work done outside of a mining claim and with direct reference to the claim may be considered as work done on the claim," and the court qualified the same with this clause: "The evidence of such work having been done should be received with great caution, and it should appear clearly that such work was intended for the improvement of such claim and no other." *Held*, that the qualification was not error.

Performance of labor a condition precedent. The Idaho statute requires a locator to do $100 worth of work on each 200 feet of a claim within six months from the date of record: *Held*, that the work must be done within that time as a condition precedent, and that failure to do such work within such time was equivalent to abandonment.

Manner of location under Idaho statutes considered.

Annual labor. Statutory method of making *prima facie* proof of annual labor stated.

[3] **Annual labor—Construction.** The law requiring work to be performed is to be construed to favor the diligent.

Status of purchasers in regard to previous labor. Purchasers failing to see that the proofs of labor have been filed are not to be considered *bona fide* purchasers.

Error to the District Court of the Second Judicial District, Alturas County.

J. BRUMBACK, for the plaintiff in error.

[1] *McGinnis* v. *Egbert*, 5 Pac. R. 659. Declaration of owner in possession, admissible: *Harrington* v. *Chambers*, 1 West C. R. 63.

[2] *Harrington* v. *Chambers*, 1 West C. R. 63; 111 U. S. 350; *Jackson* v. *Roby*, 109 U. S. 440.

[3] This case takes the same view of the statute requiring annual labor as was held in Montanain *King* v. *Edwards*, 4 M. R. 480.

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PRICKETT & HASBROUCK, for the defendant in error.

HOLLISTER, J., delivered the opinion. WHITSON, J., concurred. NOGGLE, C. J., dissented.

This is an action brought by the plaintiff in error against the defendant in error to recover the possession of a certain mining claim situated in Alturas county, which it is alleged the defendant unlawfully withheld. The judgment in the court below was for the defendant, to reverse which the plaintiff sued out this writ of error. The plaintiff assigns the following errors, viz.:

1. The court erred in sustaining the objection of respondent's counsel to the question propounded to the witness John Gray.

2. The court erred in overruling the objection of plaintiff's counsel to the introduction in evidence of the notice of the relocation by the plaintiff, of the mine.

3. The court erred in giving certain qualifications to one of plaintiff's instructions.

4. The court erred in refusing to instruct the jury as to the work to be done in the mining claim as requested by the plaintiff.

5. This is essentially the same as the fourth.

We have given to these various questions the most careful and earnest consideration and will now proceed to give the result of our deliberations.

The question propounded to the witness Gray is as follows: "Where was the location of the Phœnix ledge as stated to you by Mr. McLaughlin in July, 1864, while standing at the mouth of the Idaho tunnel?"

It appears from the record that this mine was located by the plaintiff together with McLaughlin, and four others in the preceding March, and that the declaration of McLaughlin was sought to be established upon the ground that it was part of the *res gestæ*. In order to entitle the evidence to be received, the declaration must be part of an act which may serve to explain or qualify it, and made while such act was being performed. If such declaration does not accompany the act, it can not be received. In this case the declaration was made some months after the mine was located, and formed no part of the act of location.

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In *Noyes* v. *Ward*, 19 Conn. 250, it was held, where a party on removing an ancient fence put down a stone in one of the post holes, and the next day declared that he had placed it there as a boundary, this declaration, not constituting a part of the act done, was inadmissible in his favor.

And so in *Johnson* v. *Sherwin*, 3 Gray, 374, the Supreme Court of Massachusetts held that the reasons given by a wife, on the day after her return to her father's house, for leaving her husband's house, are not a part of the *res gestæ*, as connected with and part of the act of leaving her husband's house, and so are not admissible in an action brought by her father against the husband for necessaries supplied to the wife.

The second assignment of errors we might feel disposed to consider good, had not the common law rule of evidence been changed by our statute.

This statute has provided that copies of papers duly filed in the recorder's office, certified to by the recorder, shall be received with like effect in courts, in actions and proceedings, as the original instruments, papers and notices, filed or recorded, could be produced. The phraseology of the statute is somewhat awkward, but it is evidently meant to give the same effect to such copies as courts would give to the originals when produced and their execution proved. It would be absurd to suppose that the legislature intended that the execution of papers thus filed or recorded must be proved before the certified copies can be received in evidence.

By section five of the Mining Laws of the Territory, it is required that all claims shall be recorded in the recorder's office. When this is done, the claims, or what is the same thing, the notices, may be withdrawn by the claimant after they are recorded, and in process of time, they might be lost or destroyed. It would necessarily follow in such case, that they could not be produced to be identified and proved, and there could be no proof on the subject, if the record did not furnish it. The purpose of the law would therefore be entirely defeated.

This law is framed upon the theory that no one but the person who executed the notices has any interest in having them recorded. The record therefore furnishes presumptive evidence of their execution, and this presumption can only be overcome by countervailing testimony of a preponderating

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character, which is always addressed to the judgment and understanding of the judge who tries the case, and when determined by him, upon such evidence, it is not for the appellate court to hold the decision erroneous. Like other questions of evidence, when there is a conflict, it is for the court (or jury as the case may be), to decide upon which side it preponderates; and the appellate court, sitting for the review of the evidence, and not for the purpose of weighing it, will not disturb a finding, even though it may think the preponderance the other way.

This notice purports to be signed by the plaintiff, Lynch, Nordheimer, McLaughlin, Taggart and Stevens, claiming, as tenants in common, a mine differing somewhat in its boundaries from the one first claimed and located some months after the location of the premises in controversy by the defendant, and recorded in the recorder's office, November 2, 1868, at the request of Nordheimer. The court admitted the copy, notwithstanding the plaintiff denied while on the witness stand, having signed it, or authorized any one to sign it for him, or that he had any knowledge of it until a few days before the trial, or that he ever claimed under it.

Section 5 of the act in relation to mines, provides that no person shall record claims in the name of any other person, unless he have written authority of such person or persons, and exhibit the same to the recorder, and make affidavit, to be taken by such recorder, that the written authority is genuine, who shall make a minute of such authority on his records, and file such affidavit in his office.

Without stopping to discuss the question whether one person having an interest in common with another in a mining claim, shall first obtain the written authority or consent of his co-tenant before the notices shall be recorded, it is enough to say that in the absence of proof that it was not done, we must presume that the recorder had seen and made a minute of such written consent before the notice was recorded.

The third error complained fo, is in giving by the court the qualification to the following instruction: "Work done outside of a mining claim, and with direct reference to the claim, may be considered as work done on the claim," to which the court added the following qualification: "The evidence

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of such work having been done should be received with great caution, and it should appear clearly that such work was intended for the improvement of such claim, and no other."

We think there was no error in this, for the reason that the qualification only enunciates a general principle of law, which requires that juries should receive evidence with caution, and that it should clearly be made to appear that the question sought to be established by it was thereby proved. It does not go to the extent that the fact should thereby be established conclusively, or that it should be satisfactorily established beyond a reasonable doubt. It only lays down the proposition that the minds of the jury shall be satisfied by evidence clearly preponderating upon the point.

The court was asked by the plaintiff's counsel to give the following instruction: "It is not necessary that the plaintiff's claim should be good as against the defendant, that he should have his notice of location recorded within ten days after posting the same, or that six hundred dollars worth of work should be done on his claim within six months after posting his notice. It is sufficient so far as the defendant's rights are concerned, that the notice was recorded and the necessary amount of work done before the defendant made his claim. If you find that the plaintiff's notice was recorded, and the required amount of work done before the defendant made his location, the possession of the plaintiff under the law is good. The defendant can not take any advantage of plaintiff's non-compliance with the mining law, within the time limited by such law."

This instruction was given so far as it related to the recording of the notice, and refused as to the remainder. The refusal of the court to give the instruction as asked, and the giving it as qualified, is assigned as the fourth and fifth errors.

This brings us to the consideration of the title which the plaintiff had to the premises under the mining laws of the Territory, and of his right to recover. It appears that the plaintiff was tenant in common with five others in a mine of twelve hundred feet in length, and that it was for the recovery of his portion that the suit was brought.

The instruction as asked, without the qualification, lays it down as a proposition of law if the requisite notice is given

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and the necessary amount of work done before the defendant made his location, that the possession was thereby made good. The instruction lays out of view the question whether the plaintiff, after having given the notice and performed the work, may not have abandoned the claim altogether. This he could do and yet retain no title, though the requisite notice was recorded, and the work done, and the defendant in such case might appropriate the claim to his own use. It assumes that if these prerequisites had been complied with before the defendant laid his claim, the plaintiff could hold it against him, however convincing to the minds of the jury the proofs of abandonment might be. In this view it was proper for the court to qualify it in the manner it did.

Assuming, however, that it was designed to lay down the law as to what constituted a statutory title to this species of property, we will proceed to consider it in that light. To do so intelligently we have thought it important to refer to so much of the mining law of the Territory as is thought to have any bearing upon the question.

Section one provides that any person or persons who may hereafter discover any quartz lead or lode, shall be entitled to one claim thereon by right of discovery, and one claim each by location.

Section three provides the mode in which the claim shall be marked or designated, the name of the locator, the number of feet claimed, and the time it was taken.

Section four makes provisions for the location and claim in a body, by two or more persons, by giving a notice, specifying the number of claims located and the name of each person joining in such notice, which shall be in writing, limiting the claim of each two hundred feet, except when necessary to include a discovery claim. It further provides that persons so joining in one notice shall be considered as tenants in common, and the work required to be performed on a quartz claim to entitle the locator or his assignees to hold the same as real estate, may be performed on any one of the claims so held in common, including the discovery claim.

Section five provides that all claims shall be recorded in the recorder's office within ten days from the time of posting the notices thereon, except when the claim is located more than

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thirty miles from the county seat, in which a ; the time shall be extended fifteen days.

Section six provides that quartz claims, recorded in accordance with the provisions of the act, shall entitle the person or persons so recording to hold the same to the use of himself, his heirs and assignees; provided that within six months from and after the date of recording, he or they shall perform, or cause to be performed thereon, work amounting in value to one hundred dollars for each claim of two hundred feet.

By section seven it is provided that any person or persons holding quartz claims in pursuance of the provisions of the act, shall renew the notice required in sections three and four, at least once in twelve months, and perform fifty dollars worth of work annually for each claim so located.

We have given these provisions of the act a careful examination, in order to determine whether the estate with which it was the design of the law to invest a claimant is made to depend upon the performance of the work which is required within the time prescribed, or whether the estate rests in the claimant when the work is done at any time before another lays claim to the mine.

We are constrained to hold that the work to be done must be performed within the time limited by the act, as a condition precedent, before the title can vest under the provisions of section six, and that it can not be kept good thereafter, unless further work be done as required by section seven. If these requirements are not observed, the claim may be considered abandoned and another may enter and appropriate it to his own use. The policy of the law on the subject of these mining claims seems clearly to be that they shall be worked in good faith, and to the extent and within the time required by law, and that no encouragement shall be given to merely speculative operators.

It is a matter of public notoriety that the enterprise of many who might wish to work mines is often discouraged by a mere location of another, with but a slight amount of work performed, and more especially when it is considered that there is a public sentiment among miners that no one shall be permitted to jump such claims with impunity. Under such discouragement labor and capital are diverted into other

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channels, and the law relating to mines is in this way made subsidiary, not to the interests of the laborious, enterprising miner, but to those of the idle prospector or the scheming capitalist. It is better to hold that the title to these mines shall be made to depend upon the work to be performed within the statutory limitations, than to put such a construction upon the law as will favor only those who are not laboring diligently and in apt time to develop the riches which lie hidden in the earth.

This view of the law is strengthened by the decision of the Supreme Court of California, in *Depuy* v. *Williams*, 26 Cal. 309, where it is held that the failure to perform the amount of work in a mining claim, required by the local mining laws or regulations established and in force in the district where the claim is located, amounts to an abandonment of the claim, and thereupon it may be occupied and appropriated by another.

It is strongly urged as a reason why the court should not put this construction upon the law, that most injurious if not fatal consequences would follow to those who have purchased in these claims and invested large sums in working them. To enforce this view, it is claimed that the evidence of the work performed rests in parol, and that in most cases witnesses can not be found to prove it.

By an attentive examination of the act it will be seen that the legislature has carefully guarded against such consequences by providing a mode by which such evidence may be preserved of record by all parties interested, however remote they may be from the original claimant.

Section eight is full and comprehensive on this point. It provides that any person or persons desiring to preserve and perpetuate testimony as to the sufficiency of the amount of work done on any claim or claims, to entitle him or them to hold them as real estate according to the provisions of section six, may take two disinterested persons to view such work, who shall carefully examine the same; immediately after which they shall go before the county recorder or some magistrate in the county, and take and subscribe an affidavit containing a description of the location of the claim or claims on which work is performed, the character and value of such work, and the date when they received the same, which affidavit shall be filed

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by the recorder and carefully preserved. Such affidavit or a certified copy of the same under the seal of the county recorder, who has the control of the original affidavit or affidavits, shall in any court in the Territory be *prima facie* evidence of the character and amount of labor performed on the claim or claims which are described in the affidavit or affidavits.

This section not only applies to the work performed within the first six months, but embraces all subsequent work expended upon a claim.

It is thus seen that the law places the power of perpetuating the necessary evidence as to the character and amount of work done, not only in the original locator, but also in his heirs and assignees so long as they continue to work the claim. It is true the evidence is but *prima facie*, but it is sufficient for the purpose until the opposite party shall succeed, by counter testimony of a preponderating character, in overturning it. This, it will be found in all cases, will be a difficult if not an impossible thing to do.

Conceding, however, that section eight only provides for perpetuating the testimony as to the amount of work done within the first six months, the apprehended hardship need not follow. It is competent for any one owning a mining claim by location or purchase, when he renews his notice, as provided in section seven, to re-locate the claim and put in his proofs, as provided in section eight. If he fail to do this, it will be laches of which he can not complain.

All purchasers, if they fear they can not show by parol testimony that the necessary work has been done by their grantors, can go to the recorder's office for such evidence, and if they fail to find it, and purchase, they can not be considered *bona fide* purchasers, and must, as a matter of course, take all the risk of having their title defeated.

We are of the opinion there are no errors in the record, and that the judgment of the court below must be affirmed.

Affirmed.

The petition for a rehearing having been filed herein since the judgment of affirmance was given, we have gone carefully over the grounds assumed, and can see but one point on

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which to modify our opinion then expressed, and that is upon the admissibility of the notice of re-location. We then placed our ruling on that point, on the ground that we could not see that it had any particular bearing in the case. We now put this question entirely upon the statutory provision, in regard to the admissibility of such evidence, which clearly upholds the ruling of the court below.

The petition for a rehearing is therefore denied.

CONNER ET AL., Appellants, v. MCPHEE, Respondent.

(1 Montana, 73. Supreme Court, 1868.)

Nonsuit forced by erroneous rulings. A plaintiff may move to set aside a nonsuit to which he had assented, when driven thereto by rulings of the court making it apparent that he could not recover.

Record not stating length of claim. The record of a lode claim not stating the number of feet claimed is admissible in evidence and is a compliance with the statute requiring a record to be made, and with the customary form in which they have been made.

Evidence dehors the record. The court can not review matters not presented in the record of the cause.

Appeal from the First District, Madison County.

This action was commenced by Conner and O'Neal in September, 1865, in the district court. The complaint alleged that Conner, in April, 1864, located and staked claim numbered one, southwest from the discovery claim on the Ore Cache quartz lode in Summit district, Madison county; that it comprised one hundred and twenty-five feet; that twenty-five feet was recorded by mistake as a part of the discovery claim by James Miniss, who conveyed the same to Conner by deed recorded May 10, 1864; that Conner, on October 19, 1864, conveyed to O'Neal, by deed, one undivided half of said one hundred and twenty-five feet; that Conner and O'Neal had peaceable possession of this property until November 9, 1864, and performed thereon the work required by law; that defendant, McPhee, wrongfully entered upon the same on

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November 9, 1864, and filed a pre-emption claim to one hundred feet of it; and that McPhee was mining the ground.

The defendant answered on December 4, 1865, and denied the material allegations of the complaint. He also set forth that claim numbered one, southwest from discovery claim on the Ore Cache lode, was located, pre-empted and recorded as only one hundred feet in length; that Conner pretended to pre-empt this claim, but did not stake it and comply with the law in other respects; that said claim was never worked and was vacant until McPhee located and pre-empted it on November 9, 1864; and that defendant worked and possessed said claim until August 17, 1865, when he was restrained by an order of court.

The plaintiffs filed their replication and denied the new matter contained in the answer.

The cause was tried in September, 1867, in the district court, Hosmer, J., to whose rulings upon the admission of certain evidence the plaintiffs excepted, and consented to the entry of a nonsuit. The plaintiffs then moved to set aside the nonsuit and for a new trial on account of the erroneous rulings of the court. This motion was denied and judgment then rendered against plaintiffs, who appealed.

The evidence referred to, which was contained in the exception considered by the court, appears in the opinion. The other exceptions that were taken upon the trial were not passed upon and are not embodied in the report of the case.

WORD & SPRATT, DAVIS & THOROUGHMAN, for appellants.

W. F. SANDERS and W. M. STAFFORD, for respondent.

KNOWLES, J.

The first question presented in this case is one of practice. Can the plaintiffs in an action move to set aside a nonsuit when they have consented to it, upon its becoming apparent, from the ruling of the court, that they could not recover, basing their motion upon alleged error in the rulings of the court, which induced them to consent to the nonsuit?

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Such practice we hold proper. See *Natoma Co.* v. *Clarkin*, 14 Cal. 544. A nonsuit in such cases is treated as and governed by the same rules as an involuntary nonsuit.

The only ground of error assigned which we deem it material to examine, is the exclusion of the evidence offered by the appellants.

They offered in evidence the records of Madison county, showing the record of Conner's location of the ground in dispute; a deed from Miniss to Conner of twenty-five feet of the ground in dispute; a deed from Conner to O'Neal of one half of the ground in dispute; and, lastly, they offered to prove by the testimony of Conner the number of feet staked off by him for the claim number one, southwest from discovery, on the Ore Cache lode, the size of the stakes, the notice written on them and the amount of labor performed on said claims within six months after the location of the same. The record of location offered did not specify the number of feet claimed. The court refused to allow the appellants to prove these facts, until they should first lay the foundation therefor, by proving "that the claim in coutroversy was pre-empted, and appears on the record in due form as embracing the number of feet claimed for it by plaintiffs." This is the exact language of the bill of exceptions, and would imply that the court held that the record of the location of a quartz claim should specify the number of feet claimed, and that the appellants, in this case should first introduce such a record before they could introduce other evidence. This we hold error. The language of the Idaho statute, in relation to the location and recording of quartz claims, in force at the time of the location and recording of the claim in dispute by appellants, is as follows.

"All claims shall be recorded in the county recorder's office within ten days from the time of posting notices thereon."

What record must a locator of a quartz claim make to satisfy this law? Courts generally give to such a statute the interpretation usually accorded to it by the people who use the terms therein employed. Recording a claim is a phrase used among the locators of mining claims. It is a law maxim of general application that contemporaneous exposition of a statute has great strength in controlling its interpretation. By examining the records of quartz claims in the several counties

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of this Territory, which were once a part of Idaho, and the records of quartz claims of the several counties of Idaho, at the time this law came into force, and we will arrive at some conclusion as to what was generally understood by the locators of quartz claims at that time, was a compliance with the law requiring the recording of quartz mining claims. An examination of these records, we are confident, will show that it was not generally considered necessary to state in the record the number of feet claimed. This seems to be conceded by the attorneys for both parties. And it is contended by the attorneys for the respondent that the court did not rule that a record should show the number of feet claimed. If such was the case, we do not understand the bill of exceptions signed by the judge who tried the cause, or why the record of appellants' location was excluded. If the court had no objections to Conner's testimony, and only directed that there should be first introduced the record of his location of the claim in dispute, and did not hold that this record should specify the number of feet claimed, the very record demanded had already been offered in evidence, and one of the objects of Conner's testimony was to establish the number of feet in claim number one, southwest from discovery in the Ore Cache lode, at the time this record was made. If the ruling of the court is not as we understand it, then the language used in the bill of exceptions signed by the judge who made the ruling, is very unfortunate.

We have been led to infer, however, from the arguments of counsel on both sides, that the bill of exceptions filed does not fully present all the difficulties experienced on the trial of this cause. Hence we have felt that it was difficult to render a decision which might not mislead the parties on a re-trial of the cause. We can, however, be governed only by the record presented to us. It is very defective, and perhaps on our own motion we ought to have sent it back to be perfected.

We might follow at some length the arguments of the counsel for respondent, and show that notwithstanding the facts may have been as presented in their argument, still the court erred in excluding the testimony offered. But should we do so we might be justly accused of presenting as many immaterial matters, in our opinion, as there are immaterial issues presented by the pleadings in this cause.

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In accordance with the views above expressed, the judgment of the court below is reversed, a new trial granted and the cause remanded for further proceedings.

Exceptions sustained.

WARREN, C. J., concurred.

STAPLETON ET AL., Appellants, v. PEASE, Respondent.

(2 Montana, 550. Supreme Court, 1877.)

[1] **Insufficient proof to admit copy—Original location certificate absent at land office.** Plaintiff offered in evidence a paper purporting to be the original declaratory statement (location certificate) of his lode, signed by the discoverer and sworn to before William Peck, recorder—and rested. Defendant produced one William Peck who swore that the signature to the jurat was not his signature. Plaintiff then proved that his original statement was at the U. S. land office, and offered a certified copy from the county recorder's office. *Held*, that no sufficient excuse for not producing the original was shown; (2) that the copy was not admissible, and (3) (*obiter*) that if the paper was required in the land office on application for patent, a certified copy from that office should have been produced.

Surprise. A party can not claim surprise at an attack upon a paper as *not* the original where he is shown to have known of the existence and whereabouts of another paper which was in fact the original.

The identity of persons is always presumed from the identity of names.

Appeal from Second District, Beaverhead County.

The judgment was entered by KNOWLES, J.

SHARP & NAPTON and A. E. MAYHEW, for appellants.

CHUMASERO & CHADWICK and C. W. TURNER, for respondent.

WADE, C. J.

This is an action by the appellants to recover the possession of a certain quartz lode in the Bryant district, Beaverhead

[1] As to admission of copies, see *Kramer* v. *Settle*, 9 M. R. 561; *McKinstry* v. *Clark*, 4 Mont. 370; *Sullivan* v. *Hense*, 9 M. R. 487; *Boulder Val. Co.* v. *Tierney*, 2 M. R. 381; *McGarrity* v. *Byington*, 2 M. R. 311.

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county, known as the Phœnix lode. The respondent claims the same property under the name of the Mark Antony lode.

The statute concerning the location and recording of mining claims on veins or lodes, provides that "any person or persons who shall hereafter discover any mining claim upon any vein or lode, bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits, shall, within twenty days thereafter, make and file for record in the office of the recorder of the county in which said discovery is made, a declaratory statement thereof in writing, on oath, before some person authorized by law to administer oaths, describing such claim in the manner provided by the laws of the United States." Sts. Ex. Sess. 83, § 1. The person asserting title under this statute must produce in evidence the original declaratory statement, duly signed and sworn to, or, in case the same be lost or not within his power, the record thereof, or a transcript of such record duly authenticated.

The appellants, to establish their title to the property in question, introduced in evidence, without objection, a paper purporting to be an original declaratory statement, which was signed by the discoverer and sworn to before William Peck, county recorder. They further proved the discovery of a vein of silver with well defined wall rocks, their possession and ouster by the respondent, and rested. The respondent introduced testimony tending to establish his title to the property, and called William Peck as a witness, who testified that his signature to the jurat to the declaratory statement was not genuine. It was in evidence that William Peck was the recorder of Beaverhead county at the date of the statement. The appellants then proved that they had sent the original declaratory statement of the Phœnix lode to the land office at Helena, Montana; that they had a correct copy thereof duly certified by the county recorder, and then offered the same in evidence; and that they were taken by surprise by the testimony of Peck. It is stated in the bill of exceptions that the respondent did not prove that William Peck, who testified, was the William Peck who was the county recorder at the time the statement was made.

The court thereupon rendered judgment against the appellants, who prosecute this appeal to reverse the same.

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The following facts are conclusively shown: That the declaratory statement, introduced in evidence by the appellants and on which they rest their case, was not an original document; that the original was not lost, and that it was under the control of the appellants. Under this state of facts, no copy, record or transcript thereof, could be received in evidence. The appellants contend that, as the respondent offered no evidence tending to show that the William Peck who testified as to his signature was William Peck, the county recorder, there was no proof that William Peck, the recorder, did not sign the jurat to the declaratory statement. No such proof was necessary. Identity of names is *prima facie* evidence of the identity of persons: 2 Phil. Ev., 606, notes *c*, *h*, *e*; 1 Greenl. Ev., § 575; *Thompson* v. *Manrow*, 1 Cal. 428; *Mott* v. *Smith*, 16 Id. 535; *Carleton* v. *Townsend*, 28 Id. 219; *Garwood* v. *Garwood*, 29 Id. 514; *Douglas* v. *Dakin*, 46 Id. 49; *Hatcher* v. *Rocheleau*, 18 N. Y. 86; *People* v. *Smith*, 45 Id. 772. The burden of proof was upon the appellants, if they disputed the identity of William Peck, the witness, and William Peck, the recorder, to establish the fact. But after showing, by their own proof, that the original paper was at the land office, and there by their own act, and there being nothing to show their inability to produce it in evidence at any time when required, we can not see much force in the objection that William Peck, the recorder, was not properly identified.

The purpose for which the original declaratory statement was sent to the land office is not disclosed. No attempt was made to show that it had passed beyond the reach of the appellants, and for all that appears in the record it remained there under their absolute control. If the paper was required to remain in the land office for the purpose of procuring a patent, or any other lawful object, and the appellants were unable to produce it, an authenticated transcript of the record from the proper officers of the land office would have been admissible in evidence. No attempt was made to lay this foundation for the introduction of secondary evidence, and the certified transcript of the record was properly excluded.

The appellants declare that they were taken by surprise at the testimony of Peck, but they did not ask for a continuance of the case for this reason. And they were not entitled to a

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continuance. Having the original document upon which they rested their title under their control, they should not have been surprised when its production was required by the court.

Judgment affirmed.

1. The original location certificate may be read to the jury in connection with the re-location or amended certificate: *Van Zandt* v. *Argentine Co.*, 4 M. R. 441.

2. Finding of court that the certificate contained a sufficient description, will be upheld when the record brings up no copy for examination: *Eilers* v. *Boatman*, 1 West C. R. 632.

3. Description in, construed as sufficient: *Weise* v. *Barker*, 2 West C. R. 108; as insufficient: *Faxon* v. *Barnard*, 9 M. R. 515.

4. Certificate calling only for adjoining claims as boundaries, held invalid: *Baxter Co.* v. *Patterson*, 3 West C. R. 77.

5. An "additional" location certificate may be used in evidence, although filed after suit commenced. The office and functions of a location certificate stated: *Strepey* v. *Stark*, 7 Colo. 614; 4 West C. R. 663.

6. In Montana the location certificate is required to be verified: *McBurney* v. *Berry*, 5 Pac. R. 867.

7. Should be liberally construed: *Weill* v. *Lucerne Co.*, 3 M. R. 372.

8. Variance between calls and monuments: *Pollard* v. *Shively*, 2 M. R. 229; *Johnson* v. *Parks*, 4 M. R. 316.

See LOCATION, RECORD.

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[1] EUREKA CONSOLIDATED MINING CO. v. RICHMOND MINING CO. OF NEVADA.

(4 Sawyer, 302. U. S. Circuit Court, District of Nevada, 1877.)

[2] **Lode defined.** The mining acts of Congress do not define the term lode. As there used, the term is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. It includes all deposits of mineral matter found through a mineralized zone or belt coming from the same source, impressed with the same forms, and appearing to have been created by the same processes.

Scientific definition. The definition of a lode given by geologists is that of a fissure in the earth's crust filled with mineralized matter, or more accurately, as aggregations of mineral matter containing ores, in fissures.

[3] **Prior location must file adverse claim.** Under the Mining Act of 1872, where one is seeking a patent for his mining location, and gives the prescribed notice, any other claimant of an unpatented location objecting to the patent on account of extent, or form, or because of asserted prior location, must come forward with his objections and present them, or he will be afterward precluded from objecting to the issue of the patent.

Relation in case of mining patents. The doctrine of relation can not be applied so as to cut off the rights of the earlier patentee under a later location.

Senior patent on junior location. The holder of an elder location failing to adverse the application for patent made by the holder of a junior location, waives his priority. And, if he ever afterward apply for patent, his patent is subject and junior to the patent issued on the prior application.

End lines. The provision of the act of 1872, requiring the end lines to be parallel, is directory merely. "End lines," though not named in the act of 1866, are necessarily implied.

The patent of the United States "is something upon which its holder can rely for peace and security." The presumption is that it was duly issued, and in ejectment mere surmises to the contrary will not be listened to.

[4] **Effect of end lines.** The holder of a patent can not claim any part of the vein on its strike beyond his end line, extended vertically downward.

Idem—Necessity of this construction. The limitation of a claim on a lode to a certain number of feet in length *ipso facto* confines the claim-

[1] S. C. on appeal, 9 M. R. 634.

[2] *Iron Co.* v. *Cheeseman*, 9 M. R. 552.

[3] *Nessler* v. *Bigelow*, 60 Cal. 98; *Wight* v. *Dubois*, 21 Fed. 693; 4 W. C. R. 153; *420 M. Co.* v. *Bullion Co.*, 3 Saw. 634; *Post* PATENT.

[4] *Flagstaff Co.* v. *Tarbet*, 9 M. R. 608.

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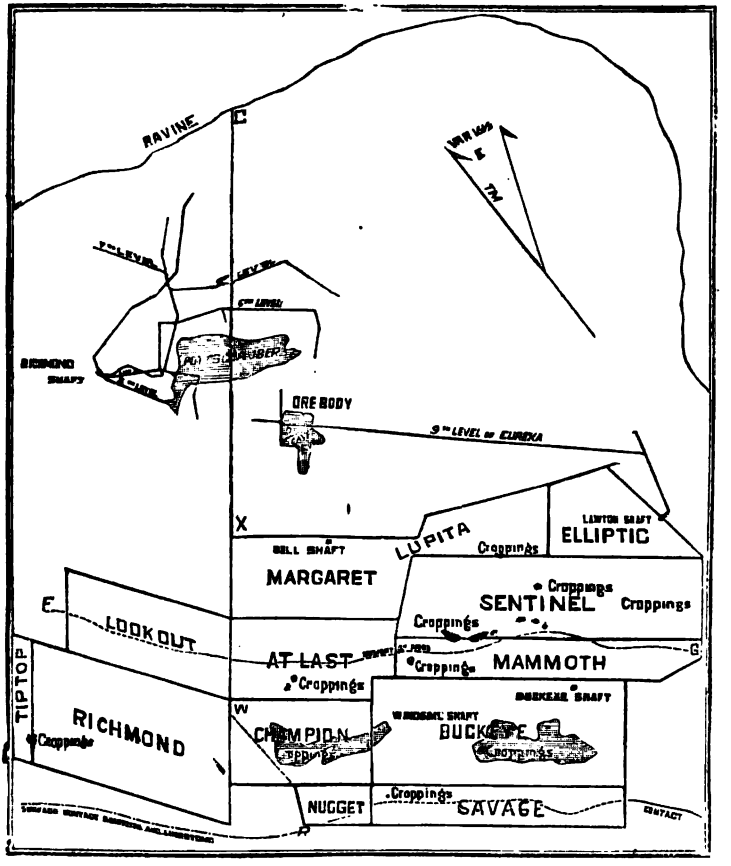
ant to that part of the lode lying within such end lines and within vertical planes drawn downward through such end lines, or such end lines extended. No other mode of division would carry out the limitation. A patented claim is limited or bounded in the same way by the mining acts in terms. The lode can not be followed beyond a vertical plane drawn downward through the end lines. or through the end lines extended to cover the dip.

An agreed line between claimants on the same lode must be carried downward and protracted in the same way.

Before Mr. Justice FIELD, SAWYER, Circuit Judge, and HILLYER, District Judge.



The accompanying diagram represents the surface location of the Champion, At Last, Margaret or Lupita, Nugget, Savage, Buckeye, Mammoth, Sentinel and Elliptic mining claims

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of the Eureka company, plaintiff, and of the Richmond, Lookout and Tip-top claims of the Richmond company, defendant; the Lawton or Eureka shaft, and the ninth level therefrom connecting with ore body D E; the Richmond shaft and levels therefrom, and the Potts chamber, from which ore has been taken through the Richmond fifth level; the line R W X, described in the agreement, and this line extended to C. The dotted line represents the surface line of contact between the quartzite and limestone. South of this line is a belt of quartzite, and north of it a belt of metamorphosed limestone, and north of this limestone is a belt of shale. The ore bodies are found in the metamorphosed limestone between the quartzite and shale. This belt of limestone bounded by the quartzite and shale extends nearly east and west over one mile, and varies in width from five to eight hundred feet on the surface, to from two to four hundred feet at the greatest depth of working, which is about nine hundred feet. The Potts chamber is about five hundred feet below the surface. The quartzite and limestone dip to the northward at an angle of about 45° from the horizon.

In 1873 the Eureka company owned the Lookout claim, and the Richmond company found on the surface in the Richmond claim, and followed down on its dip to the northward under the Lookout surface, a large body of ore. The Eureka company, claiming the ore under the Lookout surface, thereupon sued the Richmond company to determine the title thereto, and in settlement of that litigation an agreement in writing was made on the sixteenth day of June, A. D. 1873, between the plaintiff, the Eureka Consolidated Mining Company, of the first part, and the defendant, the Richmond Mining Company of Nevada, party of the second part, which provided: "Whereas differences have arisen, and now exist, between the parties hereto in respect to the ownership and right of possession of certain mining ground, known as the Lookout ground or claim, * * * and of the ores, metals and deposits found in and under said ground; and whereas an action is, or certain actions are, now pending in the courts of the State of Nevada, wherein the party hereto of the first part is plaintiff, and the party hereto of the second part and others are defendants, for the recovery * * * of the possession of the ground and of the ores therein contained, etc.; and whereas

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the said parties have agreed to settle all the differences between them, and put an end to the litigation now pending as aforesaid;

"Now, therefore, this agreement witnesseth, that the said party of the first part, for and in consideration of the sum of $85,000 * * * and the further covenants, agreements and conditions hereinafter contained * * * has agreed, and does hereby agree, to convey to the said party of the second part, its successors and assigns, with warranty against its own acts, all that certain lot, piece or parcel of land or mining ground * * * known as the Lookout ground or claim; and also all the mining ground and claim lying on the northwesterly side of a certain line, commencing at the northeasterly corner of the Margaret mining ground or claim, which corner is marked X on the map or plan hereto annexed, and made part of this agreement; running thence in a southwesterly direction along the edge of said Margaret ground, the At Last ground, and the Champion ground, to a point marked W on said map; thence southerly to the northeasterly corner of the Nugget ground; thence in a southwesterly direction along the edge of said Nugget ground to the northwesterly corner thereof, at the point marked R on said map or plan; together with all the ores, precious metals * * * and all veins, lodes, ledges, deposits, dips, spurs or angles on, *in* or *under* the same contained * * * and the said party of the first part further agrees not to protest against or put any obstacle in the way of the party of the second part in their application for a United States patent to the Richmond or other lodes or veins, provided such application does not conflict or cross the aforesaid line agreed upon * * *, and the said party of the second part, for the consideration aforesaid, hath further agreed, and doth hereby further agree, to convey unto the said party of the first part, with warranty against its own acts, all right, title or interest in or to any and all the land or mining ground * * * on the southeasterly side of the line hereinbefore mentioned and laid down on the said map hereto annexed, and in and to all ores, precious metals, veins, lodes, ledges, deposits, dips, spurs and angles, on, *in* or *under* the said land or mining ground, or any part thereof. It being the object and intention of the said parties hereto to confine the workings of the party of the second part to the

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northwesterly side of the said line continued downward to the center of the earth, which line is hereby agreed upon as the permanent boundary line between the claims of the said parties." Conveyances were also made in pursuance of this agreement.

After this agreement and settlement, the defendant followed the ore body found in the Richmond and Lookout claims downward toward the northward on the dip, and eastward on the general course or strike of the underlying quartzite and overhanging shale to the Potts chamber, where the body of ore extended eastward across the line W X, produced northward from X to C. The ore body on the line from the Richmond to the Potts chamber varied greatly in size at different points, being alternately contracted or pinched to a small seam, then widening into larger bodies, but there was a continuous connection. The defendant claimed and worked that part of the chamber to the eastward of said line W X produced to C, whereupon the plaintiff claiming that portion of the ore body as being on the dip of its portion of the lode brought this action to recover the possession.

The other facts are sufficiently stated in the opinion of the court.

S. HEYDENFELDT, R. S. MESICK, H. K. MITCHELL and GARBER & THORNTON, for plaintiff.

THOS. WREN, S. M. WILSON, R. M. CLARKE, A. M. HILLHOUSE, C. J. LANSING, CRITTENDEN THORNTON and WILLIAMS & THORNTON, for defendant.

By the Court, Mr. Justice FIELD.

This is an action for the possession of certain mining ground, particularly described in the complaint, situated in Eureka mining district, in the county of Eureka, in the State of Nevada. The plaintiff is a corporation created under the laws of California, and the defendant, the Richmond Mining Company, is a corporation created under the laws of Nevada. The other defendants, Thomas Wren and Joseph Potts, are citizens of the latter State. The action was originally commenced in a State court of Nevada, but upon application of the plaintiff, and upon the ground of its incorporation in another State,

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and the presumed citizenship, from that fact, of its corporators or stockholders in that State, it was transferred to the Circuit Court of the United States. The complaint in the State court, in addition to the usual allegations of a declaration in ejectment, set forth various grounds upon which was based a prayer for an order restraining the defendants from working the premises in controversy pending the action. The defendants, in their answer to the complaint, not only denied the title of the plaintiff, but made various averments upon which a like restraining order against the plaintiff was asked. Both orders were granted. This union of a demand in ejectment for the property in controversy, with a prayer for provisional equitable relief, is permitted by the system of procedure which obtains in the State courts, thus saving the parties the necessity of litigating in two suits what can as readily and less expensively be accomplished in one. But this union is not permitted in the federal courts; and upon the transfer of the present action, the pleadings of the plaintiff were amended by substituting a regular complaint in ejectment on the law side of the court; and a bill was filed for an injunction on its equity side. The defendants answered both, and also filed a cross-bill for an injunction against the plaintiff.

By arrangement of the parties, the defendants, Messrs. Wren and Potts, are dropped out of the controversy, and their names may be stricken from the pleadings. The claim for damages is also waived in this action, without prejudice to any future proceedings with respect to them. By stipulation, the case at law—the action of ejectment—is tried by the court without the intervention of a jury, and the judges sit at San Francisco instead of Carson, their finding and judgment to be entered in term time in the latter place as though the case were heard and decided there. The testimony taken in the action at law is to be received as depositions in the equity suit, and both cases are to be disposed of at the same time, to the end that the whole controversy between the parties may be settled at once.

The premises in controversy are of great value, amounting, by estimation, to several hundred thousands of dollars, and the case has been prepared for trial with a care proportionate to this estimate of the value of the property; and the

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trial has been conducted by counsel on both sides with eminent ability.

Whatever could inform, instruct or enlighten the court, has been presented by them. Practical miners have given us their testimony as to the location and working of the mine. Men of science have explained to us how it was probable that nature, in her processes, had deposited the mineral where it is found. Models of glass have made the hill, where the mining ground lies, transparent, so that we have been able to trace the course of the veins, and see the chambers of ore found in its depths. For myself, after a somewhat extended judicial experience, covering now a period of nearly twenty years, I can say that I have seldom, if ever, seen a case involving the consideration of so many and varied particulars, more thoroughly prepared or more ably presented. And what has added a charm to the whole trial has been the conduct of counsel on both sides, who have appeared to assist each other in the development of the facts of the case, and have furnished an illustration of the truth that the highest courtesy is consistent with the most earnest contention.

The mining ground which forms the subject of controversy is situated in a hill known as Ruby Hill, a spur of Prospect Mountain, distant about two miles from the town of Eureka, in Nevada. Prospect Mountain is several miles in length, running in a northerly and southerly course. Adjoining its northerly end is this spur called Ruby Hill, which extends thence westerly, or in a southwesterly direction. Along and through this hill, for a distance slightly exceeding a mile, is a zone of limestone, in which, at different places throughout its length, and in various forms, mineral is found, this mineral appearing sometimes in a series or succession of ore bodies more or less closely connected, sometimes in apparently isolated chambers, and at other times in what would seem to be scattered grains. And our principal inquiry is to ascertain the character of this zone, in order to determine whether it is to be treated as constituting one lode, or as embracing several lodes, as that term is used in the acts of Congress of 1866 and 1872, under which the parties have acquired whatever rights they possess. In this inquiry, the first thing to be settled is the meaning of the term in those acts. This meaning being settled, the physical

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characteristics and the distinguishing features of the zone will be considered.

Those acts give no definition of the term. They use it always in connection with the term vein. The act of 1866 provided for the acquisition of a patent by any person or association of persons claiming "a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar or copper." The act of 1872 speaks of veins or lodes of quartz or other rock in place, bearing similar metals or ores. Any definition of the term should, therefore, be sufficiently broad to embrace deposits of the several metals or ores here mentioned. In the construction of statutes general terms must receive that interpretation which will include all the instances enumerated as comprehended by them. The definition of a lode given by geologists is, that of a fissure in the earth's crust filled with mineral matter, or more accurately, as aggregations of mineral matter containing ores in fissures. (See Von Cotta's Treatise on Ore Deposits, Prime's Translation, 26.) But miners used the term before geologists attempted to give it a definition. One of the witnesses in this case, Dr. Raymond, who for many years was in the service of the general government as commissioner of mining statistics, and in that capacity had occasion to examine and report upon a large number of mines in the States of Nevada and California, and the Territories of Utah and Colorado, says that he has been accustomed, as a mining engineer, to attach very little importance to those cases of classification of deposits which simply involve the referring of the subject back to verbal definitions in the books. The whole subject of the classification of mineral deposits he states to be one in which the interests of the miner have entirely overridden the reasonings of the chemists and geologists. "The miners," to use his language, "made the definition first. As used by miners, before being defined by any authority, the term lode simply meant that formation by which the miner could be led or guided It is an alteration of the verb lead; and whatever the miner could follow, expecting to find ore, was his lode. Some formation within which he could find ore, and out of which he could not expect to find ore, was his lode." The term lodestar, guiding star or north star, he adds, is of the same origin.

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Cinnabar is not found in any fissure of the earth's crust, or in any lode, as defined by geologists, yet the acts of Congress speak, as already seen, of lodes of quartz, or rock in place, bearing cinnabar. Any definition of lode, as there used, which did not embrace deposits of cinnabar, would be as defective as if it did not embrace deposits of gold or silver. The definition must apply to deposits of all the metals named, if it apply to a deposit of any one of them. Those acts were not drawn by geologists or for geologists; they were not framed in the interests of science, and consequently with scientific accuracy in the use of terms. They were framed for the protection of miners in the claims which they had located and developed, and should receive such a construction as will carry out this purpose. The use of the terms vein and lode in connection with each other in the act of 1866, and their use in connection with the term ledge in the act of 1872, would seem to indicate that it was the object of the legislator to avoid any limitation, in the application of the acts, which a scientific definition of any one of these terms might impose.

It is difficult to give any definition of the term, as understood and used in the acts of Congress, which will not be subject to criticism. A fissure in the earth's crust, an opening in its rocks and strata made by some force of nature, in which the mineral is deposited, would seem to be essential to the definition of a lode, in the judgment of geologists. But to the practical miner the fissure and its walls are only of importance as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks. A continuous body of mineralized rock lying within any other well-defined boundaries on the earth's surface and under it, would equally constitute, in his eyes, a lode. We are of opinion, therefore, that the term as used in the acts of Congress is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. It includes, to use the language cited by counsel, all deposits of mineral matter found through a mineralized zone or belt coming from the same source, impressed with the same forms, and appearing to have been created by the same processes.

Examining, now, with this definition in mind, the features of the zone which separate and distinguish it from the sur-

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rounding country, we experience little difficulty in determining its character. We find that it is contained within clearly defined limits, and that it bears unmistakable marks of originating, in all its parts, under the influence of the same creative forces. It is bounded on the south side for its whole length, at least so far as explorations have been made, by a wall of quartzite of several hundred feet in thickness, and on its north side, for a like extent, by a belt of clay, or shale, ranging in thickness from less than an inch to seventy or eighty feet. At the east end of the zone, in the Jackson mine, the quartzite and shale approach so closely as to be separated by a bare seam, less than an inch in width. From that point they diverge, until, on the surface in the Eureka mine, they are about five hundred feet apart, and on the surface in the Richmond mine, about eight hundred feet. The quartzite had a general dip to the north, at an angle of about forty-five degrees, subject to some local variations, as the course changes. The clay or shale is more perpendicular, having a dip at an angle of about eighty degrees. At some depth under the surface these two boundaries of the limestone, descending at their respective angles, may come together. In some of the levels worked they are now only from two to three hundred feet apart.

The limestone found between these two limits—the wall of quartzite and the seam of clay or shale—has, at some period of the world's history, been subjected to some dynamic force of nature, by which it has been broken up, crushed, disintegrated, and fissured in all directions, so as to destroy, except in places of a few feet each, so far as explorations show, all traces of stratification; thus specially fitting it, according to the testimony of the men of science to whom we have listened, for the reception of the mineral which, in ages past, came up from the depths below in solution, and was deposited in it. Evidence that the whole mass of limestone has been, at some period, lifted up and moved along the quartzite, is found in the marks of attrition engraved on the rock. This broken, crushed and fissured condition pervades, to a greater or less extent, the whole body, showing that the same forces which operated upon a part, operated upon the whole, and at the same time. Wherever the quartzite is exposed, the marks of attrition appear. Below the quartzite no one has pene-

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trated. Above the shale the rock has not been thus broken and crushed. Stratification exists there. If in some isolated places there is found evidence of disturbance, that disturbance has not been sufficient to affect the stratification. The broken, crushed and fissured condition of the limestone gives it a specific, individual character, by which it can be identified and separated from all other limestone in the vicinity.

In this zone of limestone numerous caves or chambers are found, further distinguishing it from the neighboring rock. The limestone being broken and crushed up as stated, the water from above readily penetrated into it, and operating as a solvent, formed these caves and chambers. No similar cavities are found in the rock beyond the shale, its hard and unbroken character not permitting, or at least opposing such action from the water above.

Oxide of iron is also found in numerous places throughout the zone, giving to the miner assurance that the metal he seeks is in its vicinity.

This broken, crushed and fissured condition of the limestone, the presence of the oxides of iron, the caves or chambers we have mentioned, with the wall of quartzite and seam of clay bounding it, give to the zone, in the eyes of the practical miner an individuality, a oneness as complete as that which the most perfect lode in a geological sense ever possessed. Each of the characteristics named, though produced at a different period from the others, was undoubtedly caused by the same forces operating at the same time upon the whole body of the limestone.

Throughout this zone of limestone, as we have already stated, mineral is found in the numerous fissures of the rock. According to the opinions of all the scientific men who have been examined, this mineral was brought up in solution from the depths of the earth below, and would therefore naturally be very irregularly deposited in the fissures of the crushed matter, as these fissures are in every variety of form and size, and would also find its way in minute particles in the loose material of the rock. The evidence shows that it is sufficiently diffused to justify giving to the limestone the general designation of mineralized matter — metal-bearing rock. The three scientific experts produced by the plaintiff, Mr. Keyes, Mr. Raymond and Mr. Hunt, all of them of large experience and extensive attain-

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ments, and two of them of national reputation, have given it as their opinion, after examining the ground, that the zone of limestone between the quartzite and the shale constitutes one vein or lode, in the sense in which those terms are used by miners. Mr. Keyes, who for years was superintendent of the mine of the plaintiff, concludes a minute description of the character and developments of the ground, by stating that in his judgment, according to the customs of miners in this country and common sense, the whole of that space should be considered and accepted as a lead, lode or ledge of metal-bearing rock in place.

Dr. Raymond, after giving a like extended account of the character of the ground, and his opinion as to the causes of its formation, and stating with great minuteness the observations he had made, concludes by announcing as his judgment, after carefully weighing all that he had seen, that the deposit between the quartzite and the shale is to be considered as a single vein in the sense in which the word is used by miners—that is, as a single ore deposit of identical origin, age and character throughout.

Dr. Hunt, after stating the result of his examination of the ground and his theory as to the formation of the mine, gives his judgment as follows: "My conclusion is this: That this whole mass of rock is impregnated with ore; that although the great mass of ore stretches for a long distance above horizontally and along an incline down the foot wall, as I have traced it, from this deposit you can also trace the ore into a succession of great cavities or bonanzas lying irregularly across the limestone, and into smaller caverns or chasms of the same sort; and that the whole mass of the limestone is irregularly impregnated with the ore. I use the word impregnation in the sense that it has penetrated here and there; little patches and stains, ore-vugs and caverns and spaces of all sizes and all shapes, irregularly disseminated through the mass. I conclude, therefore, that this great mass of ore is, in the proper sense of the word, a great lode, or a great vein, in the sense in which the word is used by miners; and that practically the only way of utilizing this deposit is to treat the whole of it as one great ore-bearing lode or mass of rock."

This conclusion as to the zone constituting one lode of rock-bearing metal, it is true, is not adopted by the men of science

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produced as witnesses by the defendant, the Richmond company. These latter gentlemen, like the others, have had a large experience in the examination of mines, and some of them have acquired a national reputation for their scientific attainments. No one questions their learning or ability, or the sincerity with which they have expressed their convictions. They agree with the plaintiff's witnesses as to the existence of the mineralized zone of limestone with an underlying quartzite and an overlying shale; as to the broken and crushed condition of the limestone, and substantially as to the origin of the metal and its deposition in the rock. In nearly all other respects they disagree. In their judgment, the zone of limestone has no features of a lode. It has no continuous fissure, says Mr. King, to mark it as a lode. A lode, he adds, must have a foot wall and a hanging wall, and if it is broad these must connect at both ends, and must connect downward. Here there is no hanging wall or foot wall; the limestone only rests as a matter of stratigraphical fact on underlying quartzite, and the shale overlies it. And distinguishing the structure at Ruby Hill from the Comstock lode, the same witness says that the one is a series of sedimentary beds laid down in the ocean and turned up; the other is a fissure extending between two rocks.

The other witnesses of the defendant, so far as they have expressed any opinion as to what constitutes a lode, have agreed with the views of Mr. King. It is impossible not to perceive that these gentlemen at all times carried in their minds the scientific definition of the term as given by geologists, that a lode is a fissure in the earth's crust filled with mineral matter, and disregarded the broader, though less scientific definition of the miner, who applies the term to all zones or belts of metal-bearing rock lying within clearly marked boundaries. For the reasons already stated we are of opinion that the acts of Congress use the term in the sense in which miners understand it.

If the scientific definition of a lode, as given by geologists, could be accepted as the only proper one in this case, the theory of distinct veins existing in distinct fissures of the *lime*-stone would be not only plausible, but reasonable; for *that* definition is not met by the conditions in which the Eureka mineralized zone appears. But as that definition can not be

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accepted, and the zone presents the case of a lode as that term is understood by miners, the theory of separate veins as distinct and disconnected bodies of ore falls to the ground. It is therefore of little consequence what name is given to the bodies of ore in the limestone, whether they be called pipe veins, rake veins or pipes of ore, or receive the new designation suggested by one of the witnesses; they are but parts of one greater deposit, which permeates, in a greater or less degree, with occasional intervening spaces of barren rock, the whole mass of limestone, from the Jackson mine to the Richmond, inclusive.

The acts of Congress of 1866 and 1872 dealt with a practical necessity of miners; they were passed to protect locations on veins or lodes, as miners understood those terms. Instances without number exist where the meaning of words in a statute has been enlarged or restricted and qualified to carry out the intention of the legislature. The inquiry, where any uncertainty exists, always is as to what the legislature intended, and when that is ascertained it controls. In a recent case before the Supreme Court of the United States, singing birds were held not to be live animals, within the meaning of a revenue act of Congress: *Reiche* v. *Smythe*, 13 Wall. 162. And in a previous case, arising upon the construction of the Oregon Donation Act of Congress, the term, a single man, was held to include in its meaning an unmarried woman: *Silver* v. *Ladd*, 7 Wall. 219. If any one will examine the two decisions, reported as they are in Wallace's reports, he will find good reasons for both of them.

Our judgment being that the limestone zone in Ruby Hill, in Eureka District, lying between the quartzite and the shale, constitutes, within the meaning of the acts of Congress, one lode of rock-bearing metal, we proceed to consider the rights conveyed to the parties by their respective patents from the United States. All these patents are founded upon previous locations, taken up and improved according to the customs and rules of miners in the district. Each patent is evidence of a perfected right in the patentee to the claim conveyed, the initiatory step for the acquisition of which was the original location. If the date of such location be stated in the instrument, or appear from the record of its entry in the local land office, the patent will take effect by relation as of that date, so

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far as may be necessary to cut off all intervening claimants, unless the prior right of the patentee, by virtue of his earlier location, has been lost by a failure to contest the claim of the intervening claimant, as provided in the act of 1872. As in the system established for the alienation of the public lands, the patent is the consummation of a series of acts, having for their object the acquisition of the title, the general rule is to give to it an operation by relation at the date of the initiatory step, so far as may be necessary to protect the patentee against subsequent claimants to the same property. As was said by the Supreme Court in the case of *Shepley* v. *Cowan*, 1 Otto, 338, where two parties are contending for the same property, the first in time, in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right.

But this principle has been qualified in its application to patents of mining ground, by provisions in the act of 1872, for the settlement of adverse claims before the issue of the patent. Under that act, when one is seeking a patent for his mining location and gives proper notice of the fact as there prescribed, any other claimant of an unpatented location objecting to the patent of the claim, either on account of its extent or form, or because of asserted prior location, must come forward with his objections and present them, or he will afterward be precluded from objecting to the issue of the patent. While, therefore, the general doctrine of relation applies to mining patents so as to cut off intervening claimants, if any there can be, deriving title from other sources, such perhaps as might arise from a subsequent location of school warrants or a subsequent purchase from the State, as in the case of *Heydenfeldt* v. *Daney Gold Mining Co.*, reported in the third of Otto, the doctrine can not be applied so as to cut off the rights of the earlier patentee under a later location, where no opposition to that location was made under the statute. The silence of the first locator is, under the statute, a waiver of his priority.

But from the view we take of the rights of the parties under their respective patents, and the locations upon which those patents were issued, the question of priority of location is of no practical consequence in the case.

The plaintiff is the patentee of several locations on the Ruby Hill lode, but for the purpose of this action it is only

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necessary to refer to three of them—the patents for the Champion, the At Last, and the Lupita or Margaret claims. The first of these patents was issued in 1872, the second in 1876, and the third in 1877. Within the end lines of the locations, as patented in all these cases, when drawn down vertically through the lode, the property in controversy falls. Objection is taken to the validity of the last two patents, because the end lines of the surface locations patented are not parallel, as required by the act of 1872. But to this objection there are several obvious answers. In the first place, it does not appear upon what locations the patents were issued. They may have been and probably were, issued upon locations made under the act of 1866, where such parallelism in the end lines of the surface locations was not required. The presumption of the law is, that the officers of the executive department, specially charged with the supervision of applications for mining patents and the issue of such patents, did their duty; and in an action of ejectment, mere surmises to the contrary will not be listened to. If, under any possible circumstances, a patent for a location without such parallelism may be valid, the law will presume that such circumstances existed. A patent of the United States for land, whether agricultural or mineral, is something upon which its holder can rely for peace and security in his possessions. In its potency it is ironclad against all mere speculative inferences. In the second place, the provision of the statute of 1872, requiring the lines of each claim to be parallel to each other, is merely directory, and no consequence is attached to a deviation from its direction. Its object is to secure parallel end lines drawn vertically down, and that was effected in these cases by taking the extreme points of the respective locations on the length of the lode. In the third place, the defect alleged does not concern the defendant, and no one but the government has the right to complain.

The defendant, the Richmond Mining Company, also holds several patents issued to it upon different locations; but in this case it specially relies upon the patents of the Richmond and Tip-top claims. It is alleged that these patents were issued upon locations made earlier than any upon which the patents to the plaintiffs were issued. Assuming this to be the

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fact, and claiming from it that the patents, by relation back to such locators, antedate in their operation the patents of the plaintiff, and the further fact that the locations were made under the act of 1866, the defendant relies upon the facts assumed to defeat the pretensions of the plaintiff. It contends that inasmuch as the croppings of the vein it works are within the surface of its patented locations, it can follow the vein wherever it leads, though it be outside of the end lines of the locations when vertically drawn down through the lode. Its position is that, whenever under the law of 1866 a location was made on a lode or vein, a right was acquired to follow the vein wherever it might lead, without regard to the end lines of the location. This position is urged with great persistence by one of the counsel of the defendant, and with the ability which characterizes all his discussions.

The second section of the act of 1866, upon the provisions of which this position is based, provides: "That whenever any person, or association of persons, claims a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar or copper, having previously occupied and improved the same according to local customs or rules of miners in the district where the same is situated, and having expended in actual labor and improvements thereon an amount of not less than one thousand dollars, and in regard to whose possession there is no controversy or opposing claim, it shall and may be lawful for said claimant, or association of claimants, to file in the local land office a diagram of the same, so extended, laterally or otherwise, as to conform to the local laws, customs and rules of miners, and to enter such tract and receive a patent therefor granting such mine, together with the right to follow such vein or lode, with its dips, angles and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition."

It will be seen by this section that to entitle a party to a patent his claim must have been occupied and improved according to the local customs or rules of miners of the district, and that his diagram of the same, filed in the land office, in its extension laterally or otherwise, must be in conformity with them.

The rules of the miners in the Eureka mining district, adopted in 1865—laws of the district, as t

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the miners—provided that claims of mining ground should be made by posting a written notice on the claimant's ledge defining its boundaries, if possible; that each claim should consist of two hundred feet on the ledge; but claimants might consolidate their claims by locating in a common name, if, in the aggregate, no more ground was claimed than two hundred feet for each name, and that each locator should be entitled to all the dips, spurs and angles connecting with his ledge; and that a record of all claims should be made within ten days from the date of location. The rules also allowed claimants to hold one hundred feet each side of their ledge for mining and building purposes, but declared that they should not be entitled to any other ledge within this surface.

It will be perceived by these rules that they had reference entirely to locations of claims on ledges. It would seem that the miners of the district then supposed that the mineral in the district was only found in veins or ledges, and not in isolated deposits. In February, 1869, new rules were added to those previously passed, authorizing the location of such deposits. These new rules provided that each deposit claim should consist of one hundred feet square, and that the location should take all the mineral within the ground to any depth.

Under these rules, square locations and linear locations were made by parties, through whom the defendant derives title on what is called the Richmond ledge, and linear locations were made on what is called the Tip-top ledge, with surface locations for mining purposes, both parties claiming with their locations all dips, spurs and angles. It is only of the linear locations we have occasion to speak; it is under them that the defendant asserts title to the premises in controversy.

Now, as neither the rules of miners in Eureka mining district nor the act of 1866, in terms, speak of end lines to locations made on ledges, nor in terms impose any limitation upon miners following these veins wherever they may lead, it is contended that no such limitation can be considered as having existed and be enforced against the defendant. The act of 1866, it is said, recognizes the right of the locator to follow his vein outside of any end lines drawn vertically down when it permits him to obtain a patent granting his mine, "together with the right to follow such vein or lode with its dips, angles

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and variations to any de th, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition."

It is true that end lines are not in terms named in the rules of the miners, but they are necessarily implied, and no reasonable construction can be given to them without such implication. What the miners meant by allowing a certain number of feet on a ledge was that each locator might follow his vein for that distance on the course of the ledge, and to any depth within that distance. So much of the ledge he was permitted to hold as lay within vertical planes drawn down through the end lines of his location, and could be measured anywhere by the feet on the surface. If this were not so, he might by the bend of his vein hold under the surface along the course of the ledge double and treble the amount he could take on the surface. Indeed, instead of being limited by the number of feet prescribed by the rules, he might in some cases oust all his neighbors and take the whole ledge. No construction is permissible which would substantially defeat the limitation of quantity on a ledge, which was the most important provision in the whole system of rules.

Similar rules have been adopted in numerous mining districts, and the construction thus given has been uniformly and everywhere followed. We are confident that no other construction has ever been adopted in any mining district in California or Nevada. And the construction is one which the law would require in the absence of any construction by miners. If, for instance, the State were to-day to deed a block in the city of San Francisco to twenty persons, each to take twenty feet front, in a certain specified succession, each would have assigned to him by the law a section parallel with that of his neighbor of twenty feet in width, cut through the block. No other mode of division would carry out the grant.

The act of 1866 in no respect enlarges the right of the claimant beyond that which the rules of the mining district gave him. The patent which the act allows him to obtain does not authorize him to go outside of the end lines of his claim, drawn down vertically through the ledge or lode. It only authorizes him to follow his vein with its dips, angles and variations, to any depth, although it may enter land adjoining

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—that is, land lying beyond the area included within his surface lines. It is land lying on the side of the claim, not on the ends of it, which may be entered. The land on the ends is reserved for other claimants to explore. It is true, as stated by the defendant, that the surface land taken up in connection with a linear location on the ledge or lode is, under the act of 1866, intended solely for the convenient working of the mine, and does not measure the miner's right, either to the linear feet upon its course, or to follow the dips, angles and variations of the vein, or control the direction he shall take. But the line of location taken does measure the extent of the miner's right. That must be along the general course or strike, as it is termed, of the ledge or lode. Lines drawn vertically down through the ledge or lode, at right angles with a line representing this general course at the ends of the claimant's line of location, will carve out, so to speak, a section of the ledge or lode, within which he is permitted to work, and out of which he can not pass.

As the act of 1866 requires the applicant for a patent to file in the local office a diagram of his claim, such diagram must necessarily present something more than the mere linear location. It is intended that it should embrace the surface claimed for the working of the mine. In this way each of the patents of the parties embraces one or more acres and the fraction of an acre of surface ground and some hundred linear feet on the lode.

The act of 1872 preserves to the miner the rights acquired under the act of 1866, and confers upon him additional rights. Under the act of 1866, he could only hold one lode or vein, although more than one appeared within the lines of his surface location. The surface ground was allowed him for the convenient working of the lode or vein located, and for no other purpose; it conferred no right to any other lode or vein. But the act of 1872 alters the law in this respect; it grants to him the exclusive right of possession to a quantity of surface ground not exceeding a specified amount, and not only to the particular lode or vein located, but to all other veins, lodes and ledges, the top or apex of which lies within the surface lines of his location, with the right to follow such veins, lodes or ledges to any depth. But these additional rights are granted subject to the limitation that in following the veins,

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lodes or ledges, the miner shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of his location, and a further limitation upon his right in cases where two or more veins intersect or cross each other. The act in terms annexes these conditions to the possession not only of claims subsequently located, but to the possession of those previously located. This fact, taken in connection with the reservation of all rights acquired under the act of 1866, indicates that in the opinion of the legislature no change was made in the rights of previous locators by confining their claims within the end lines. The act simply recognized a pre-existing rule applied by miners to a single vein or lode of the locator, and made it applicable to all veins or lodes found within the surface lines.

Our opinion, therefore, is that both the defendant and the plaintiff, by virtue of their respective patents, whether issued upon locations under the act of 1866, or under the act of 1872 were limited to veins or lodes lying within planes drawn vertically downward through the end lines of their respective locations; and that each took the ores found within those planes at any depth in all veins or lodes, the apex or top of which lay within the surface lines of its locations.

The question of priority of location is therefore, as already stated, of no practical importance in the case. This question can only be important where the lines of one patent overlay those of another patent. Here neither the plaintiff nor defendant could pass outside of the end lines of its own locations, whether they were made before or after those upon which the other party relies. And inasmuch as the ground in dispute lies within planes drawn vertically downward through the end lines of the plaintiff's patented locations, our conclusion is that the ground is the property of the plaintiff, and that judgment must be for its possession in its favor.

The same conclusion would be reached if we looked only to the agreement of the parties made on the sixteenth of June, 1873. At that time the plaintiff owned the patented claim called the Lookout claim, adjoining on the north the Richmond claim. The defendant had worked down from an incline in the Richmond and Tip-top into the ore under the surface lines of the Lookout patent. The plaintiff thereupon brought an action for the recovery of the ground and the ore.

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taken from it. A compromise and settlement followed which are contained in an agreement of that date, and were carried out by an exchange of deeds. A map or plat was made showing the different claims held by the two parties. A line was drawn upon this map, on one side of which lay the Champion, the At Last and the Margaret claims, and on the other side lay the Richmond and the Lookout claims. By the agreement of the parties, the plaintiff, on the one hand, was to convey to the defendant the Lookout ground, and also all the mining ground lying on the northwesterly side of the line designated, with the ores, precious metals, veins, lodes, ledges, deposits, dips, spurs or angles, on, in or under the same, and to dismiss all pending actions against the defendant; and on the other hand, the defendant was to pay to the plaintiff the sum of $85,000, and to convey, with warranty against its own acts, all its right, title or interest, in and to all the mining ground situated in the Eureka mining district, on the southeasterly side of the designated line, and in and to all ores, precious metals, veins, lodes, ledges, deposits, dips, spurs or angles, on, in or under the same. "It being," says the agreement, "the object and intention of the said parties hereto to confine the workings of the party of the second part (the Richmond Mining Company) to the northwesterly side of the said line continued downward to the center of the earth, which line is hereby agreed upon as the permanent boundary line between the claims of the said parties."

The deeds executed between the parties the same day were in accordance with this agreement. The deed of the Richmond Mining Company to the plaintiff conveyed all the mining ground lying on the southeasterly side of the designated line, "together with all the dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed."

The line thus designated, extended down in a direct line along the dip of the lode, would cut the Potts chamber, and give the ground in dispute to the plaintiff. That it must be so extended necessarily follows from the character of some of the claims it divides. As the Richmond and the Champion were vein or lode claims, a line dividing them must be extended

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along the dip of the vein or lode, so far as that goes, or it will not constitute a boundary between them. All lines dividing claims upon veins or lodes necessarily divide all that the location on the surface carries, and would not serve as a boundary between them, if such were not the case. The plaintiff would, therefore, be the owner of the ground in dispute by the deed of the defendant, even if it could not assert such ownership solely upon its patented locations. Our finding, therefore, is for the plaintiff, and judgment must be entered thereon in its favor for the possession of the premises in controversy.

BROWN ET AL. V. '49 AND '56 QUARTZ MINING CO.

(15 California, 152. Supreme Court, 1860.)

[1] **Slide quartz from the ledge.** The locator of a quartz lode is not confined simply to the solid quartz in place, but is entitled to the loose quartz rock and decomposed material containing gold, which was once a part of the lode, and is now detached, so far as the general formation of the ledge can be traced.

Idem. But this right could not be extended to cover free gold at a distance of several hundred feet, although such gold might be proved to have originally come from the ledge above.

Right based on appropriation. The right of the miner comes from appropriation, and the appropriator of the ledge is entitled to the rock broken from it, as well as the mass; nor is it important whether this broken quartz is found on top of the surface or beneath it.

Custom of miners, controls. In anomalous cases (*e. g.* upon the question whether quartz broken from the ledge belongs to the lode claim or to a subsequent surface claim located below it), the custom of miners is entitled to great, if not controlling weight.

Custom in other districts. Whether the custom of miners in other districts admissible, considered.

Appeal from the Fifteenth District.

The suit was for the value of the gold alleged to have been taken by defendants from the claim of plaintiffs, and converted to their own use. The complaint averred continuous

[1] Broken ledge: *Iron Co.* v. *Murphy*, 1 M. R. 548; *Stevens* v. *Williams*, 1 M. R. 557.

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trespasses by defendants upon plaintiffs' claims — the trespasses consisting in removing sluice-boxes, filling up ditches, and taking out the gold on the claims. Damages were asked in the sum of $60,500, and also an injunction, which was granted, and subsequently, before the hearing, dissolved.

The recorded notice of the quartz claim of respondents is as follows:

"Notice is hereby given, that we, the undersigned, under the name and title of the '49 and '56 Quartz Mining Company, have this fourteenth day of November, A. D. 1856, claimed, and by virtue of these presents do claim, ten (10) claims of one hundred and fifty (150) feet each, on the quartz lead known as the Rich Gulch Quartz Lead, situated near Yankee Hill, in Oregon township and county of Butte — said claims commencing at Turner, White & Co.'s claims (known as the Virgin Quartz Mining Company), running thence in a southerly direction fifteen hundred (1,500) feet, compris ing all the spurs and branches of said lead."

There was much conflicting evidence as to whether, by the custom of miners in different districts, the loose, detached quartz rock belonged to the locator of the lead.

The case was tried before the court by consent of parties, and judgment rendered dismissing the action. The facts sufficiently appear in the opinion. Plaintiffs appeal.

JOS. E. N. LEWIS, P. A. MCRAE and MCCONNELL & GARBER, for appellants.

MONSON & SUNDEHLAND, for respondents.

BALDWIN, J., delivered the opinion of the court, FIELD, C. J., and COPE, J., concurring.

The question in this case, involving plaintiff's title to recover, has been discussed by the counsel for the appellants with a great deal of scientific learning and with much ingenuity. The facts are that the defendants, a corporation, in November, 1856, located and recorded the claims covering a part of a quartz lode now in their possession. The defendants made some permanent and expensive improvements—a mill, tunnels,

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roads, etc. Subsequently to this the plaintiffs took up four surface or hillside claims, by which they claimed the whole of the hillside, from the ravine to the quartz lode held by defendants. The plaintiffs commenced working their claims near the ravine, and worked up hill until they approached within twenty or twenty-five feet of the solid ledge worked by the defendants. They were stopped by defendants, who claimed the ownership of the ground above the point thus worked by plaintiffs. At the point approached by plaintiffs, the ledge had cropped above the surface or bed rock, and had fallen down the hill, but along the ledge the fallen masses remained in contact with the solid ledge. As the distance from the solid ledge increased, the blocks of detached rock became smaller, and the interstices between the blocks became greater and the quartz itself more decomposed. The whole of this outcropping was covered with red earth, which also filled the interstices between the detached masses of rock. The quartz thus fallen and the earth between the blocks of quartz were filled with gold; but the whole of it was what is called quartz gold, and is distinguished from washed gold by having a rough, scraggly appearance. These masses of quartz were covered with earth to the depth of about three feet, in which there was little or no gold, and this earth was stripped off and thrown down the hillside. The defendants worked a narrow strip of ground fifteen or twenty feet wide and twenty or thirty feet long, on which these fallen masses of quartz were found. Some of the witnesses state that they trailed the ledge distinctly as far as the defendant's worked. For the gold taken by the defendants from the premises in dispute, this suit is brought.

There is no question as to the priority of the defendants' location. The only question is, whether by their location and claim the defendants became entitled to this loose quartz rock and decomposed material, which was once, if not now, a part of the quartz ledge. The view taken of this matter by the learned judge below strikes us as sensible and just. In his findings he says: "It certainly would be a very great hardship to the quartz miner—he having priority of claim—to adopt the reasoning of plaintiffs' counsel, and confine the quartz miner to the solid quartz actually imbedded in the solid bed rock. It is shown by the evidence, this in many cases is but a

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small proportion of the real value of the ledge. Where the ledge comes to the surface there is always more or less detached quartz rock and always more or less decomposed quartz. In most cases this portion is more highly prized than the solid ledge itself, for this reason, that it requires far less labor and expense to prepare it for working than the same quantity of the solid ledge, and oftentimes makes a much greater return in yield of gold.

"In this case the portion of the quartz in action is described as having the appearance as if the quartz ledge had been pushed up through the crevice in the bed rock above the surface of the bed rock; that the portion thus exposed above the surface had broken off and fallen down the hill. The ledge in the bed rock is about two feet in thickness, and the masses of quartz rock which had broken off and fallen down the hill were of about the same thickness—many of them, at least. The witnesses, some of them who worked in the taking away of the rock and earth, say they could trace the general thickness of the ledge as far as they did work.

"It is argued by plaintiffs that this doctrine would, by parity of reasoning, give to the defendants all the gold in the surface earth down as far as the ravine, a distance of four or five hundred feet, as it might be easily shown that all the gold in the surface earth had once been a portion of the ledge, and had become free gold by the decomposition of the quartz rock in which it had once been held. I think the reasoning could hardly reach to that extent, but would certainly give to the prior quartz miner all the gold in detached or decomposing quartz, so far as the general formation of the ledge could be traced. And I think it could make no difference whether the ledge had been thrown above the surface of the earth, and having fallen over, was lying flat upon the earth, or whether the ledge was still standing perpendicularly in the earth, or whether the ledge was still one solid mass of quartz rock, or had become entirely decomposed, and of no greater density than the ordinary earth around it. The court is of opinion from the above that the defendants are not shown to have worked beyond the limits of their ledge of quartz; and having priority of right in time, they were entitled so to work, and having the right, could peaceably remove the sluice-boxes thereon."

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This principle, thus clearly stated and limited, gives the party appropriating a quartz lead the rights which, by his location, he evidently designed to take. It is a more simple rule than that invoked by the plaintiffs, and is calculated to prevent interference and litigation, and to ignore nice distinctions and subtle controversies, both as to rule and fact. Indeed, if the kind of quartz and the condition and quality of the rock in which it is, or in connection with which it be found, are to determine the right of the locator, it is scarcely possible to put a limit to the number of questions, or the amount or extent of litigation to which the principle would give rise. There is no reason in the nature of things why, as the right comes from appropriation, whenever the claim is defined, the appropriation should not as well take effect upon quartz in a decomposed state as in any other sort, or why the condition to which natural causes may have reduced the rock should give character to the title of the locator. Nor can we perceive why the appropriation of the ledge is any the less entitled to respect, from the fact that the rock has been broken instead of remaining in solid mass. The only question of fact was, whether this quartz rock, whether parted or not from its original connection, was a portion of the same quartz lode *or claim* taken up by the defendants; and the court seems to find, on evidence before it, that it was. We think it not important whether it was upon the surface or beneath it, or in what condition the quartz was, if this were the true state of the case.

The custom of miners is entitled in these anomalous cases to great, if not controlling weight, and though the court does not expressly find this custom, the evidence strongly confirms the view taken by the judge below

We do not think there is anything in the point that this testimony of custom in other districts was admitted improperly. We are not convinced that this proof was not proper under the facts. But the error, if one, was immaterial, as the case was tried by the court, and the judgment placed on independent grounds, upon which it can stand.

Judgment affirmed.

After a rehearing of the case, the judgment was affirmed by a full bench, for the reasons given in the foregoing opinion.

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FOOTE, Appellant, v. NATIONAL MINING CO., Respondent.

(2 Montana, 402. Supreme Court, 1876.)

[1] **Width of lode claim.** The statute of Montana, of 1864, allowed to a locator 200 feet in length along the lode discovered: "also fifty feet on each side of said" lode. for working purposes. *Held*, that the measurement of the width of the claim should be from the walls of the lode, so as to make the width of the claim include the width of the lode, with fifty feet additional on each side.

Appeal from Third District, Lewis and Clarke County.

GEORGE B. FOOTE, in person, appellant.

CHUMASERO & CHADWICK, for respondents.

WADE, C. J.

The question presented for our determination in this case relates to the width of a mining lode claim under the act of the legislative assembly of December 26, 1864, which act was in force at the date of the location of the claims in dispute. The respondent maintains that the true construction of the statute authorized the location and pre-emption of fifty feet on each side of the lode, in addition to the width of the lode itself, while the appellant insists that in no case under such statute can a lode claim exceed one hundred feet, and that the fifty feet on each side thereof must be measured from the center of the lode.

The statute in question is as follows: "Sec. 3. Claims on any lead, lode or ledge, either of gold or silver, hereafter discovered, shall consist of not more than two hundred feet along the lead, lode or ledge, together with all dips, spurs and angles emanating or diverging from said lead, lode or ledge as also *fifty feet on each side* of said lead, lode or ledge for working purposes." Cod. Sts. 522.

[1] See district rule cited in *McCormick* v. *Varnes*, 9 M, R. 503.

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The statute seems unambiguous in its terms, and unless its application to its subject-matter renders it doubtful its interpretation will be easy.

Do the words, "Fifty feet on each side of said lead, lode or ledge," mean fifty feet from the center thereof?

In construing this language regard must be had to what in truth a lead or lode is, and when so tested the problem seems easy of solution and free from doubt. A lead or lode is not an imaginary line without dimensions; it is not a thing without shape or form, but before it can legally and rightfully be denominated a lead or lode it must have length and width and depth; it must be capable of measurement; it must occupy defined space and be capable of identification. Before a quartz claim can be legally located, a lead or lode containing gold or silver must be discovered, and before such discovery can be called a discovery, at least one well-defined wall or side to the lode must be found. What then is a quartz lode? It is a fissure or seam in the country rock filled with quartz matter bearing gold or silver. This fissure may be wide or narrow: it varies in width from one inch, or even less, to one hundred feet, or much more. The sides of a lead are represented and defined by the walls of the country rock, and these walls must be discovered, and the lead identified thereby, before it can be located and held as a lead. Sides or walls then being necessary to a lead, it follows that a statute, giving to the locator fifty feet on each side of a lead for working purposes, must be construed to mean fifty feet from each wall or side of the lead. The fifty feet on each side can not include any of the lead. If the lead is ten feet wide the location may be one hundred and ten feet in width, being fifty feet on each side of the ten feet occupied by the lead. There is nothing in the statute to require or to warrant the measurement of the fifty feet to commence at the center of the lead; whether it be wide or narrow the discoverer thereof is entitled to his claim thereon and fifty feet on each side thereof, and if he was confined to fifty feet on each side of the center of the lead, oftentimes it would occur that he could not receive what he is justly entitled to by virtue of his discovery, for it is sometimes the case that a lead is more than one hundred feet in width.

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The answer contained no defense to the action of the plaintiff, and judgment was properly rendered for the plaintiff on the pleadings.

Judgment affirmed.

THE FLAGSTAFF SILVER MINING CO. v. TARBET.

(98 United States, 463. Supreme Court, 1878.)

Location failing to cover the lode. A location of a mining claim, upon a lode or vein of ore, should be laid along the same lengthwise of the course of its apex at or near the surface, as well under the mining act of 1866 as under that of 1872. If located otherwise, the location will only secure so much of the lode or vein as it actually covers.

Right to follow d'p—Effect of end lines. Each locator is entitled to follow the dip of the lode or vein to an indefinite depth, though it carries him outside of the side lines of the location; but this right is based on the hypothesis that the side lines substantially correspond with the course of the lode or vein at the surface, and it is bounded at each end by the end lines of the location, crossing the lode or vein, and extended perpendicularly downward and indefinitely in their own direction.

[1] **If a location be laid crosswise of a lode** or vein, so that its greatest length crosses the same instead of following the course thereof, it will secure only so much of the vein as it actually crosses at the surface, and the side lines of the location will become the end lines thereof, for the purpose of defining the rights of the owners.

Trespasser tapping lode on the dip. A locator working subterraneously into the dip of the vein belonging to another locator who is in possession of his location, is a trespasser, and liable to an action for taking ore therefrom.

Error to the Supreme Court of the Territory of Utah.

The facts are stated in the opinion of the court.

Submitted on printed arguments by J. M. WOOLWORTH, for the plaintiff in error, and by CHARLES W. BENNETT, for the defendant in error.

JUSTICE BRADLEY delivered the opinion of the court.

[1] *Golden Fleece Co.* v *Cable Co.*, 1 M. R. 120; *McCormick* v. *Varnes*, 9 M. R. 506.

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This was an action in the nature of *trespass quare clausum fregit*, brought in the District Court of the Territory of Utah for the Third District, by Alexander Tarbet, and continued by his assignee, Helen Tarbet, against the Flagstaff Silver Mining Company of Utah (limited), and other persons. The action having been dismissed as to the other persons, judgment was rendered for $45,000 damages upon the verdict of a jury against the company. The latter carried the case to the Supreme Court of the Territory, where the judgment was affirmed on the third day of June, 1878. The company thereupon sued out this writ of error.

The controversy relates to the working of a mine in Little Cottonwood mining district in the county of Salt Lake. The defendant in error claims to own and to have been in possession of a mining location on a lode called the Titus lode, the location including three claims and extending 600 feet westwardly from the discovery, with a width of 200 feet, and including ten feet on the east side of the discovery, belonging to the South Star mine. The plaintiff in error owned and had a patent for another mining location called the Flagstaff mine, one hundred feet in width and 2,600 feet in length, running in a northerly and southerly direction, and crossing the Titus claims near the west end thereof, and nearly at right angles therewith. In working from the Flagstaff mine the plaintiffs in error worked around subterraneously, to a point some 300 feet to the east of their location, and on the north side of the Titus mine, and within about 100 feet of the Titus location. It is for this working that the suit was brought; and the principal question is whether the plaintiff in error had a right thus to work outside of its location on the east, and whether in doing so it interfered with the rights of the defendant in error.

It is conceded that both parties are working on the same lode or vein of ore. The Flagstaff discovery, to which the location of the plaintiff in error relates as its starting point, is situated nearly due west from that of the South Star and Titus, and about 550 feet therefrom. The lode crops out at the two points of discovery, but is not visible at intermediate points. These croppings, however, show that the direction or course of the apex of the vein, at or near the surface,

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is nearly east and west. The location of the Titus, claimed by the defendant in error, nearly corresponds with this surface course of the vein. The location of the Flagstaff, belonging to the plaintiff in error, crosses it nearly at right angles.

The principal difficulty in the case arises from the fact that the surface is not level, but rises up a mountain in going from the Titus discovery to the Flagstaff. The dip of the vein being northeasterly, it happens that by following a level beneath the surface the strike of the vein runs in a northwesterly direction, or about north fifty degrees west. In other words, if, by a process of abrasion, the mountain could be ground down to a plain, the strike of the vein would be northwest instead of west, as it now is on the surface, or at least as the evidence tended to show that it is. In that case the location of the defendant in error would leave the vein to its right, and the location of the plaintiff in error would not reach it until several hundred feet to the north of the Flagstaff discovery.

Evidence having been given *pro* and *con* in reference to the condition and situation of the vein, both at and below the surface, and to the workings thereon by both parties, the judge charged the jury as follows:

"If you find that Alexander Tarbet, during the time mentioned in the comp laint, to wit, from January 1, 1873, to December 14, 1875, (being a period of 2 years, 11 months and 14 days,) was in possession of the whole or an undivided interest of Nos. 1, 2, and 3, of the Titus mining claim, and ten feet of No. 1 of the South Star mining claim, holding the same in accordance with the mining laws and the customs of the miners of the mining district, and that the apex and course of the vein in dispute is within such surface, then, as against one subsequently entering, he is deemed to be possessed of the land within his boundaries to any depth, and also of the vein in the surface to any depth on its dip, though the vein, in its dip downward, passes the side line of the surface boundary, and extends beneath other and adjoining lands; and a trespass upon such part of the vein on its dip, though beyond the side surface line, is unlawful to the same extent as a trespass on the vein inside of the surface boundary. This possession of the vein outside of the surface line, on its dip, is limited in

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two ways: by the length of the course of the vein within the surface, and by an extension of the end lines of the surface claim vertically and in their own direction, so as to intersect the vein on its dip; and the right of a possessor to recover for trespass on the vein, is subject to only these restrictions."

Again, "the defendant, plaintiff in error, has not shown any title or color of title to any part of the vein, except so much of its length on the course as lies within the Flagstaff surface, and the dip of the vein for that length; and it has shown no title, or color of title, to any of the surface of the South Star and Titus mining claim, except to so much of No. 3 as lies within the patented surface the Flagstaff mining claim."

The court refused to give the following instructions, propounded by the plaintiff in error, to wit:

"By the act of Congress of July 26, 1866, under which all of these locations are claimed to have been made, it was the vein or lode of mineral that was located and claimed; the lode was the principal thing, and the surface area was a mere incident for the convenient working of the lode; the patent granted the lode, as such, irrespective of the surface area, which an applicant was not bound to claim; it was his convenience for working the lode that controlled his location of the surface area, and the patentee under that act takes a fee-simple title to the lode, to the full extent located and claimed under said act."

Secondly, "In the very nature of the thing a lode or vein, in its unworked and undeveloped stage, can not be known and surveyed so as to plat it and make a diagram of it; the law does not require impossibilities, and must receive a reasonable construction. The diagram, required to be filed by the applicant for a patent under the act of 1866, was a diagram of the surface area claimed, and this diagram might be extended laterally and otherwise as convenience in working this claim might suggest to the applicant."

These instructions and refusals to instruct indicate the general position taken by the court below, namely, that a mining claim secures only so much of a lode or vein as it covers along the course of the apex of the vein on or near the surface, no matter how far the location may extend in another direction.

The plaintiff in error has made the following assignment of error, which indicates the position which it contends for:

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"The plaintiff in error assigns for error the charge of the court and the refusal to give its requests; that is, that the judge instructed the jury that the defendant below had shown no title or color of title to any part of the vein except so much of its length on its course as lies within the surface ground patented; and that he refused to direct the jury, that by the act of Congress it was the vein or lode of mineral that was located and claimed, and that the patent granted the lode irrespective of the surface area, which was merely for the convenience of working the lode; that the diagram required to be filed by an applicant for a patent was of the surface claimed, and might be extended laterally or otherwise, as convenience in working the claim might suggest; that the surface ground patented does not measure the grantee's right to the vein or lode in its course, or control the direction which he shall take; and, lastly, that the Flagstaff company have the right to the lode for the length thereof claimed in the location notice, though it runs in a different direction from that in which it was supposed to run at the time of the location."

Both parties agree in the general rule that the owner of a mining right in a lode or vein can not follow the course of the vein beyond the end lines of his location extended perpendicularly downward; but that he may follow the dip to an indefinite distance outside of his side lines. This is undoubtedly the general rule of miner's law and the true construction of the act of Congress. The language of the act of 1866 (14 Stat. 251) in relation to "a vein or lode" is, "that no location hereafter made shall exceed 200 feet in length *along the vein* for each locator, with an additional claim for discovery to the discoverer of the lode, with the right to follow such vein *to any depth*, with *all its dips, variations and angles*, together with a reasonable quantity of surface for the convenient working of the same as fixed by the local rules, etc." The act of 1872 is more explicit in its terms, but the intent is undoubtedly the same as it respects end lines and side lines and the right to follow the dip outside of the latter. We think that the intent of both statutes is, that mining locations on lodes or veins shall be made thereon lengthwise, in the general direction of such veins or lodes on the surface of the earth where they are discoverable; and that the end lines are to

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cross the lode and extend perpendicularly downward and to be continued in their own direction either way horizontally; and that the right to follow the dip outside of the side lines is based on the hypothesis that the direction of these lines corresponds substantially with the course of the lode or vein at its apex on or near the surface. It was not the intent of the law to allow a person to make his location cross-wise of a vein so that the side lines shall cross it and thereby give him the right to follow the strike of the vein outside of his side lines. That would subvert the whole system sought to be established by the law. If he does locate his claim in that way, his rights must be subordinated to the rights of those who have properly located on the lode. Their right to follow the dip outside of their side lines, can not be interfered with by him. His right to the lode only extends to so much of the lode as his claim covers. If he has located cross-wise of the lode and his claim is only one hundred feet wide, that one hundred feet is all he has a right to. This we consider to be the law as to locations on lodes or veins.

The location of the plaintiff in error is thus laid across the Titus lode, that is to say, across the course of its apex at or near the surface; and the side lines of the location are really the end lines of the claim, considering the direction or course of the lode at the surface.

As the law stands, we think that the right to follow the dip of the vein is bounded by the end lines of the claim properly so called; which lines are those which are cross-wise of the general course of the vein on the surface. The Spanish mining law confined the owner of a mine to perpendicular lines on every side, but gave him greater or less width according to the dip of the vein. See Rockwell, pp. 56, 58, and pp. 274, 275. But our laws have attempted to establish a rule by which each claim shall be so many feet of the vein, lengthwise of its course, to any depth below the surface, although laterally, its inclination shall carry it ever so far from a perpendicular. This rule the court below strove to carry out, and all its rulings seem to have been in accordance with it.

The plaintiff in error contended and requested the court to charge, in effect, that having received a patent for 2,600 feet in length and 100 feet in breadth, commencing at the Flagstaff discovery, on the lode at the surface, it was entitled to 2,600

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feet of that lode along its length, although it diverged from the location of the claim, and went off in another direction. We can not think that this is the intent of the law. It would lead to inextricable confusion. Other locations correctly laid upon the lode, and coming up to that of the plaintiff in error on either side would, by such a rule, be subverted and swept away. Slight deviations of the outcropping lode from the location of the claim would probably not affect the right of the locator to appropriate the continuous vein; but if it should make a material departure from his location, and run off in a different direction, and not return to it, it certainly could not be said that the location was on that lode or vein farther than it continued substantially to correspond with it. Of what use would a location be, for any purpose of defining the rights of parties, if it could be thus made to cover a lode or vein which runs entirely away from it. Though it should happen that the locator, by sinking shafts to a considerable depth, might strike the same vein on its subterranean descent, he ought not to interfere with those who, having properly located along the vein, are pursuing their right to follow the dip in a regular way. So far as he can work upon it and not interfere with their right, he might probably do so; but no farther. And this consequence would follow irrespective of the priority of the locations. It would depend on the question as to what part of the vein the respective locations properly cover and appropriate.

We do not mean to say that a vein must necessarily crop out upon the surface, in order that locations may be properly laid upon it. If it lies entirely beneath the surface, and the course of its apex can be ascertained by sinking shafts at different points, such shafts may be adopted as indicating the position and course of the vein, and locations may be properly made on the surface above it, so as to secure a right to the vein beneath. But where the vein does crop out along the surface, or is so slightly covered by foreign matter that the course of its apex can be ascertained by ordinary surface exploration, we think that the act of Congress requires that this course should be substantially followed in laying claims and locations upon it. Perhaps the law is not so perfect in this regard as it might be; perhaps the true course of a vein should

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correspond with its strike, or the line of a level run through it; but this can rarely be ascertained until considerable work has been done, and after claims and locations have become fixed. The most practicable rule is to regard the course of the vein as that which is indicated by surface outcrop, or surface explorations and workings. It is on this line that claims will naturally be laid whatever be the character of the surface, whether level or inclined.

If these views are correct, the Titus claims, belonging to the defendant in error, were located along the vein or lode in question, in a proper manner, and the Flagstaff claims, belonging to the plaintiff in error, were located across it, and can only give the latter a right to so much of the vein or lode as is included between their side lines. The court below took substantially this view of the subject, and ruled accordingly.

As this is really the whole controversy in the case, it is unnecessary to examine more minutely the different points of the charge, or the instructions asked for by the plaintiff in error. The question was presented in different forms, but all to the same general purport.

Judgment affirmed.

TABOR ET AL. V. DEXTER ET AL.

THE "NEW DISCOVERY" V. THE "LITTLE CHIEF" LODE.

(Carpenter's Mining Code, 71. U. S. Circuit Court, District of Colorado, 1878-9.)

[1] **In place—Superficial deposit—Dip.** Ore, with no other covering than the superficial debris is not a lode *in place*, such as may be followed beyond the side lines of its location.

Opinion on motion for preliminary injunction by HALLETT, J.

[1] *Leadville Co.* v. *Fitzgerald*, 4 M. R. 380.

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This is a bill for an injunction by parties owning the New Discovery lode, in California Mining District, against the owners of an adjoining claim called the Little Chief. It is not alleged that the defendants have entered upon or into the New Discovery ground, or that they have in any way interfered with plaintiffs' possession within the limits of the New Discovery location. The charge is that plaintiffs' lode descends into the Little Chief's ground on its dip, and that defendants are there mining and exhausting the ore. In other words, plaintiffs contend that the top of the lode is in their ground, and that they have the right to follow upon its downward course into and through adjoining territory. To maintain this position it is necessary to show that the lode is *in place* within the meaning of Sec. 2320, Revised Statutes of the United States. And this depends upon the position of the ore or vein matter in the earth, as whether the inclosing mass is fixed and immovable, more than upon the character of the ore itself. Whether the ore is loose and friable, or very hard, if the inclosing walls are country rock, it may be located as a vein or lode. But if the ore is on top of the ground, or has no other covering than the superficial deposit, which is called alluvium, diluvium, drift, or debris, it is not a lode or vein within the meaning of the act, which may be followed beyond the lines of the location. In this bill it is alleged that the overlying material is boulders and gravel, which can not be *in place* as required by the act. Not much is known to the court of the deposits on Fryer Hill, but it would seem from the allegations in this bill that they differ materially from the Iron mine, which has a hanging wall as well as a foot wall. For the decision of this motion it is enough to say, that where the mass overlying the ore is a mere drift, or a loose deposit, the ore is not in place within the meaning of the act. Upon principles recently explained, a location on such a deposit of ore may be sufficient to hold all that lies within the lines, but it can not give a right to ore in other territory, although the ore body may extend beyond the lines.

The motion will be denied.

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MOUNT DIABLO MILL AND MINING CO. v. J. L. CALLISON ET AL.

(5 Sawyer, 439. U. S. Circuit Court, District of Nevada, 1879.)

[1] **Vein and lode defined—The "country" distinguished from the vein.** Metalliferous rock in place, not in a fissure, may be found under such conditions within clearly defined boundaries as to require recognition as a vein or lode (as in the *Eureka case*), but a broad metalliferous zone having within its limits true fissure veins plainly bounded, can not be regarded as a single vein or lode, although such zone may itself have boundaries which can be traced.

[2] **A locator is entitled to the width prescribed by the district rule** for all lode claims, without specifying the number of feet in width in his location notice.

If it were held necessary to fix the width in the notice, a claim in such notice for "all the privileges granted by the laws" of the mining district would fulfill the requirement.

Old locations entitled to the side veins. Section three of the Mining Act of May 10, 1872, recognizes, as valid, locations of mining claims made prior to its passage, and confirms the locators thereof in the exclusive possession of all the lodes which have their apex within the surface lines of such mining claims.

"Mining claim" defined. Mining claim is the name given to that portion of the public mineral land which the miner takes up and holds, in accordance with mining laws, local and statutory, for mining purposes, and the term includes the vein specifically located, all the surface ground located on each side of it, and all other veins or lodes having their apex inside the surface lines.

[3] **Definition of "work on a claim."** Work on a claim is work done anywhere upon the surface of it, within its surface lines, or anywhere below the surface within those lines, extended down vertically, and though it should be shown that the work done within the lines below the surface was also within a lode having its apex outside of such vertical surface lines, it will still be work on the claim within the meaning of section 2324 of the United States Revised Statutes.

Work done outside of a claim for the purpose of prospecting or developing it, is as available for holding the claim as if done within the boundaries of the claim itself.

[4] **Road-building,** counted as annual labor.

[1] *Harrington* v. *Chambers*, 1 West C. R. 63.

[2] *Erhardt* v. *Boaro*, 113 U. S. 527.

[3] *Slavonian Co.* v. *Vacavich*, 7 Saw. 217; *DuPrat* v. *James*, 3 West C. R. 651; *Russell* v. *Brosseau*, Id. 781; *Jackson* v. *Roby*, 109 U. S. 440.

[4] *St. Louis Co.* v. *Kemp*, 104 U. S. 655; *Post* PATENT.

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[1]**The owner of several contiguous claims may form one general system** adapted and intended to work them all, and when such is the case work in furtherance of the system is work on all the claims intended to be developed by it.

Forfeitures are deemed, in law, odious, and must be made clearly apparent before courts will enforce them.

Before SAWYER, Circuit Judge, and HILLYER, District Judge.

The facts are stated in the opinion.

GARBER & THORNTON and JONAS SEELY, for plaintiff.

STEWART, VANCLIEF & HERRIN and LINDSEY & DICKSON, for defendants.

By the Court, HILLYER, D. J.

This is an action to recover possession of a mining claim, situate in the Columbus Mining District, Esmeralda County, Nevada.

The complaint alleges ownership of 1,400 feet of a certain quartz lode, called the Dinero lode, 700 feet easterly and 700 feet westerly from the Dinero location monument, "together with 100 feet of surface on each side of said 1,400 feet of said lode," with all the dips, spurs, etc.; and also all that portion of the Dinero and of all other lodes or veins, the top or apex of which lies within such surface lines, and end planes drawn north and south through points 700 feet east and west from a stake marked "Center Mount Diablo Claim."

The trial has been by the court, a jury having been waived by a written stipulation of counsel. There has been a somewhat extended oral argument, and, in addition, a very full discussion of all the points in briefs.

The point most discussed is as to the lateral boundaries of the Mount Diablo lode; the plaintiff contending that the Mount Diablo, Dinero and Callison, or "Mountain Boy" claims are all on one and the same vein or lode, and the defendants that the Callison is a lode distinct from every other

[1] *Chambers* v. *Harrington*, 111 U. S. 350.

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in that district. By agreement of parties three scientific mining experts only were examined on each side. For the plaintiff, W. S. Keyes, Carl Davis and Dr. Blatchley, are of the opinion that the said claims are on one single lode. For the defendants, C. A. Luckhart, Professor W. F. Stewart and Charles F. Hoffman, are of opinion that the Callison is a separate lode. All of these experts are men of large and practical experience in mining. Each one has examined the mining region now in question with care, and has, under oath, stated the facts upon which he bases his opinion. If the court is not now fully informed, such result is not due to the failure of the parties on either side to present their case thoroughly, but to the inherent difficulties to be found in the questions brought forward for decision. We proceed now to a consideration of the first question stated, namely, whether the Mount Diablo and Callison claims are on the same or separate lodes.

We find at the point where the claim in controversy is located, a metalliferous belt, or zone, or district, extending east and west, some two miles in length, the width of which has not, so far as appears in this case, been accurately ascertained. Scattered over this belt or zone, a dark rock stained with iron and manganese is seen, called by all the witnesses croppings. Looking west from the Mount Diablo claim, the general course of the metalliferous region can be seen marked by these black croppings for about two miles. Along this line a great many claims have been located; in some cases several claims being parallel, or nearly so.

Describing this belt of country at the point where the claim in dispute lies, the experts tell us that they find on the south of the Peru claim, and perhaps coming into that claim, a rock in place which they call, variously, silicious or stratified or unaltered clay slate. (The Peru is a claim, belonging to the plaintiff, which lies immediately south of the Mount Diablo. Then follow, going north, the Mount Diablo, the Dinero, and lastly the Mountain Boy, which covers on the surface nearly the same ground as the Dinero.)

Going north from the Peru, that is across the belt, the experts find a rock which the plaintiff's witnesses name clay slate, and which, they insist, notwithstanding some alterations in color

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and texture, extends from the stratified slate on the south to a belt of greenstone found about two hundred feet north of the Callison claim, or some eight hundred feet from the Peru south line. This rock is, according to the plaintiff's experts, for the most part a decomposed clay slate. In many places, and especially near ore bodies, it is white and without signs of stratification; in other places it becomes a hard and highly silicious rock of a dark brown color, also unstratified, but always, in their opinion, clay slate, more or less altered and decomposed, and all a part of the Mount Diablo lode. On the other hand, the experts of the defendants name this prevailing rock in the Mount Diablo, Dinero and Callison claims, felsite porphyry and decomposed felsite porphyry; the former being the dark brown, and the latter the white clay slate of the plaintiff's witnesses.

Except in the names they give the rocks, and that they differ as to the presence of feldspar crystals therein, the witnesses on both sides agree in their description of such rocks as to color, texture, and position.

The stratified slate on the south is barren, as is the greenstone to the north. Throughout this belt the ore bodies—the pay ores—have occurred quite irregularly, unless we except the Callison ore body, to be considered further on. The main tunnel of the Mount Diablo followed, for two or three hundred feet, a crack or fissure which Mr. Keyes at first took to be the fissure up through which the metals came to impregnate the neighboring rocks; but later concluded was a rent made after the deposition of the metals.

Along the line of this tunnel for the first two hundred feet, the paying ores of the Mount Diablo have chiefly been found. From a point at the foot of an incline (No. 2) sunk from this tunnel, which point is near the center of the Mount Diablo claim, a drift, called the "connecting drift," has been run north two hundred and thirty feet to the Callison upper incline and ore body. At a distance of one hundred and fifteen feet from the foot of this incline there is encountered in the drift a belt of rock, called by some of the witnesses the "black dyke," which is from twenty-two to thirty feet in thickness. By whatever name called, clay slate or porphyry, it is in every exterior quality, presented to the sight or touch, a different

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rock from that adjoining it on each side. About two hundred and fifty feet east of this, in the "blue drift" run from the foot of incline No. 3, a dyke of similar rock is found at a depth considerably greater than in the connecting drift, and appearing, from its position and physical properties, to be the same black dyke found in the connecting drift. This dyke the defendants claim is the hanging wall of the Mount Diablo lode. Assuming it to be continuous between the points exposed in the two drifts, it has a course east and west corresponding to the general course of the ore channels in the Mount Diablo and Callison claims. Going on north in the connecting drift from this dyke, we pass through some decomposed felsite porphyry or slate, some quartz and other rocks, not in place, just under the ravine which runs between the Mount Diablo and Callison claims, and at ninety feet north of the dyke come to a stratum of dark, hard, flinty rock, which is about six feet thick; lying upon this next comes about fifteen feet of defendants' decomposed felspathic porphyry or plaintiff's clay slate, which defendants call their foot wall. Then comes the Callison ore body from two to six feet thick, followed by a hanging wall of the white, decomposed, barren rock extending on one hundred feet or more to belts of porphyry, greenstone and serpentine. From the Mount Diablo tunnel to the "black dyke," assays taken by Mr. Keyes every ten feet show from sixty-four dollars and ten cents in one place twenty feet north of the tunnel, to three dollars and seventy-seven cents silver.

The black dyke is practically barren, though traces of silver are shown by some assays. The material passed through is none of it "pay ore," but is called "vein matter"

From the north side of the dyke to the edge of the Callison foot wall, the assays of Mr. Keyes show from five dollars and sixty-five cents, to traces of silver. The Callison foot wall is entirely barren, except that traces of silver may be found on its outermost edges.

The Callison ore channel has been opened one hundred and seventy-seven feet in depth on its dip, and one hundred and eighty-six feet in length on its course or strike; throughout its whole extent the ore has lain on this barren white clay or porphyry, dipping with regularity to the north, at an angle of about forty-five degrees. It is from two to six feet thick, and

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the hanging wall is this white material before mentioned, extending on north one hundred feet or more. The ore bodies in the Mount Diablo are bounded by decomposed white rock, similar to the foot and hanging walls of the Callison, though no body so large and regular has been found as that in the Callison.

These are the leading facts, and upon them—though the question is not entirely free from doubt—we are inclined to think, and for the purposes of this decision shall assume, that the Callison is a vein or lode separate from the Mount Diablo, within the meaning of those words as used in the acts of Congress, and as interpreted in the *Eureka Case*, 4 Saw. 302. In that case it was held that the terms, vein and lode, are applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock.

It was considered in that case that the terms vein and lode, as used by Congress, for reasons there given, could not be restricted, always, to "aggregations of mineral matter in fissures of rocks," that is to say, to typical fissure veins, but must be so extended as to include any other aggregation of mineral matter containing ores lying within clearly defined boundaries. Such boundaries were found in that case in the quartzite on the south, and the clay slate on the north. Between those boundaries, however, no others appeared clearly dividing the included rock or vein matter; and it never was intended in that case to hold that every metalliferous zone of country to which boundaries could be found must be regarded as one vein or lode, for this would be to reduce all mining districts to one lode. Moreover, in this case we look in vain for *clearly defined* boundaries where the plaintiff claims the boundaries to be. Dr. Blatchley, a witness for plaintiff, says that on the south "the line of demarkation between the stratified slate which contains no mineral and that which is not so strongly stratified and does contain mineral (meaning gold and silver) is not very *clearly defined*." Again he says: "There is no distinct or definite line that can be drawn accurately." Mr. Keyes considers the stratified slate as the boundary between the Peru and a claim southwest of it called the "Stump and Adams." This division line is observable on the surface, but he has seen no boundary of unaltered slate below. Both

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he and Dr. Blatchley consider the south limit of the lode to be where the "impregnation" ends. To the north, where the greenstone is found, the boundary is still less clearly defined. Dr. Blatchley says the line of demarkation between the greenstone and slate "is not plain and clear; * * * to fix it exactly would be very difficult." Again he says, "they (the divisions) are all very vague and indefinite." Beyond the slate claimed to be the boundary on the south, ore has been found, increasing the difficulty of fixing the limits of impregnation in that direction.

Looking, then, at this metalliferous zone as a whole, at the point where the claims in question lie, it is impossible to find clearly *defined boundaries*. There is, however, such a zone there, and there is, no doubt, a limit beyond which the rocks are not impregnated with silver, which limit is at present not clearly ascertained.

Having such a zone or district, when we find within it fissures like that opened by the Callison, filled with ore, we think we must regard them as veins or lodes. For, while metalliferous rock in place may be so found within defined boundaries as to require recognition as a lode, although not in a fissure, a broad metalliferous zone can not be permitted to swallow up, under the name "lode," true fissure veins found within its limits. We think the Callison claim must be regarded as being upon such a fissure, and as having unmistakable visible boundaries.

We have been unable to feel the importance of determining whether the prevailing rock in these claims shall be called decomposed clay slate, with the plaintiff, or decomposed felsite porphyry, with the defendants. Nor do we regard it as a safe guide, in determining whether there is one lode or more here, that chemical analysis shows these rocks to be composed of the same ingredients. The same test would require us to pronounce plumbago, anthracite coal and massive diamond to be the same.

In these cases, where visible practical boundaries are the important things, the optical qualities of rocks seem to us a safer guide than chemical analysis. All the witnesses agree that true fissures may exist in this rock, whether slate or porphyry; and be it what it may, we find at the Callison mine

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a fissure having foot and hanging walls, dip, strike, and a quite uniform breadth. Judging from exterior appearances, we at once pronounce the brown quartz, the stratified clay slate, the decomposed material, and the "black dyke," different rocks. To the eye, the foot wall of the Callison mine, with its brown, flinty quartz and overlying clay, is a plain line of demarkation between it and the country south of it. For the purposes of this decision, therefore, as before stated, we shall assume the Callison to be a separate vein or lode.

Assuming the Callison to be a separate lode, still the plaintiff claims it, under the operation of the mining laws of the Columbus district, by virtue of the Dinero location. Section 8 of those laws reads as follows: "Section 8. Each locator or claimant in any ledge in this district, shall be entitled to two hundred (200) feet by location, and all the dips, spurs, angles, offshoots, outcrops, depths, widths and variations, and all the minerals and other valuables therein contained; and the discoverer and locator of any new ledge or lode shall be entitled to one claim of two hundred (200) feet additional for discovery. The locator, or locators, of any ledge or lode, shall also be entitled to hold one hundred feet on each side of said ledge or lode, together with all minerals (whether in distinct ledges or otherwise) therein contained."

Under this section, the plaintiff contends that when a party locates a given number of feet along a given lode, he holds, by virtue of such location, a hundred feet on each side of his lode, without expressly claiming it in his notice; or, in other words, that when a party becomes a locator, he is entitled to hold in that quality the one hundred feet on each side of his lode.

The Dinero notice reads as follows:

"NOTICE.—Dinero Quartz Claim, 1,400 feet.

We, the undersigned, this seventh day of September, A. D. 1867, locate and claim fourteen hundred feet (1,400) on this Dinero Quartz Lode, together with all the privileges granted by the laws of this, the Columbus Mining District, running 700 feet each side of this notice.

(Signed) A. HANKE,
And Five Others."

Upon the strength of the claim in this notice of all the

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privileges granted by the district laws, the plaintiff further contends that if the quantity of surface ground claimed must be put in the notice of location, he has substantially and sufficiently complied with the law.

The requirements of the Columbus mining laws in regard to locating claims, are that "each claim located shall have a mound or stake placed thereon, on which shall be marked the name of the company, and the number of feet located and claimed;" and further, that "all notices of location shall contain the names of the locators or claimants." There is nothing requiring a marking out of the surface boundaries on the ground.

The construction placed upon the mining laws by the defendants is, that before a locator becomes entitled to hold this surface ground, he must claim it and give notice of his claim; that the miner can not hold what he has not claimed, and that it is as essential to locate and claim the surface and specify the number of feet on each side desired, as the number of feet along the lode. Further, that the claim of "all the privileges," etc., does not help the plaintiff, that claim being too indefinite to be of any validity.

After a careful consideration of the language used by the miners, the circumstances under which and the condition of the district at the time the laws were made, together with the arguments of counsel, we are constrained to hold that the miners meant by section eight to say that when a person had become a locator by putting up his stake or mound and his notice of the number of feet claimed on the lode, with the name of the company and the names of the locators, such person became, by virtue of such location, invested with a right to hold one hundred feet on each side of the lode he had located.

The language is, "the locator of a ledge shall be entitled to hold one hundred feet on each side of his ledge," not that he may locate that quantity of surface ground. This construction gains force from the language which follows that entitling the locator to one hundred feet on each side of his ledge, viz., "together with all minerals (whether in distinct ledges or otherwise) therein contained." This shows that the one hundred feet were to be held for something more than surface ground, for convenience in working the claim. When the

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miners framed the law, doubts existed—doubts which have not yet been settled—as to the character of the ore deposits in the Columbus district.

Hence this privilege was intended to secure the locator a reasonable quantity of ground, whether his ore deposit should be called a lode or impregnation or "otherwise." It was, as we think, a definition of what a location of feet along a lode or supposed lode should embrace.

But if we admit that there ought to be a claim and notice of the surface ground, aside from the location of the lode itself, then we consider the notice in this case to be a good and valid notice of the claim of Hanke and his co-locators to fourteen hundred feet along the Dinero lode and to one hundred feet on each side of that lode.

If it is necessary to express in terms the number of feet the locator intends to claim on each side of the lode, would it not be equally necessary to claim, in distinct, express terms, all the dips, spurs and angles of the lode, which the mining law gives to the locator? We presume it would not be insisted that the locator should not be permitted to follow the dip of his lode outside his surface lines unless he had expressed his intention to claim that right in terms. Yet the right to dips, spurs, etc., is given by the mining law in the same terms as the right to one hundred feet on each side of the lode.

The object of any notice at all being to guide a subsequent locator, and afford him information as to the extent of the claim of the prior locator, whatever does this fairly and reasonably, should be held a good notice. Great injustice would follow, if, years after a miner had located a claim, and taken possession and worked upon it in good faith, his notice of location were to be subjected to any very nice criticism.

We agree with the defendants, that the locator should make his location so certain that the miners who follow him may know the extent of his claim, and be able to locate the unoccupied ground without fear that when they shall have found a paying mine, the theretofore indefinite lines of some prior location may be made to embrace it.

But, *id certum est quod certum reddi potest.* When the miner has stated, as the rules require, the number of feet he claims along the lode on which he has set his stake, and has

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referred all whom it may concern to the laws of the district, by claiming all the privileges granted by the laws of the district, and those laws in express terms entitle each locator to hold one hundred feet on each side of his lode, then the length and breadth of his claim are fixed with reasonable certainty, because, by reading the laws of the district, with the notice referring him to them, the subsequent locator can make certain the exact thing claimed. See *Gleeson* v. *Martin White M. Co.*, 13 Nevada, 443.

It is true that a locator might, if he desired, take less than the one hundred feet, but in this case, Hanke and his associates did claim all the law allowed.

And, after all, is it not the gist of the whole matter, that the miner actually takes possession and goes to work, thus giving publicity to his claim? That was done in this case. Plaintiff and its grantors have been on this ground, claiming it, prospecting and working it for years. The defendants can not claim to have been misled by the notice in this case, for when they located the Mountain Boy, in February, 1878, they knew it was upon the Dinero claim, but insisted that the Dinero, for lack of the required amount of work upon it, had been forfeited.

Besides all this, in March, 1876, almost two years before the defendants located the Mountain Boy, the plaintiff had made a survey, and staked off the extension boundaries of what it claimed, beyond all chance of mistake. This was done by placing stakes as follows: One at the center, one at the east and one at the west end of the center line of the Mount Diablo claim; one three hundred feet north, and one three hundred feet south of both the east and west center stakes, thus plainly marking the center line and the four corners of ground claimed by the plaintiff, under the three locations made by Hanke and his associates. The Mountain Boy claim is almost wholly located within the lines marked by these stakes, and the ore body opened by the Callisons has its apex eighty-seven feet south of plaintiff's north line as thus marked.

We think the plaintiff under the mining law quoted, became entitled to hold one hundred feet on each side of the Dinero lode, by virtue of the original location, unless, as is further urged by defendants, this section 8 was void for conflict with the

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act of Congress of 1866 (14 St. 251). It does not appear to us necessary, at this day, to decide the effect of the act of 1866 upon locations made after its passage, and before the act of 1872. We think it by no means certain that the act of 1866 confined locations so that surface ground could not have been taken up, embracing more than one lode, although it is true that a patent under that act could have issued but for one lode.

For, be this as it may, the act of 1872 (17 St. 91, R. S., Sec. 2322) recognizes locations made prior to its passage, the surface lines of which included more than one vein or lode. The language is, "The locators of all mining locations *heretofore* made * * * shall have the exclusive right of possession, and enjoyment of all the surface included within the lines of their location, and of all veins, lodes or ledges, the top or apex of which lies inside such surface lines." * * *

It is very clear that this language reaches the case of locators who had located claims while the act of 1866 was in force, the surface lines of which included the tops of more than one lode, and confirms their possession to all the surface and all the lodes included within their lines. That is the case at bar. The top or apex of the Callison lode lies within the surface lines of the Dinero, and within forty-seven and a half feet of the location monument which Hanke placed on the Dinero croppings; and it follows that the plaintiff is entitled to the exclusive possession of the Callison lode, unless, for non-compliance with the law, a forfeiture of the Dinero claim has been incurred.

The evidence altogether refutes the idea that there was any abandonment in fact, or any intention to abandon the Dinero claim on plaintiff's part. There can be no doubt from the evidence that sufficient work was done on the Dinero claim to hold it down to 1876 and 1877. But however that may be, it is conceded that, under the statute, if sufficient work was done during the year 1877 to hold it, then there was no forfeiture. The whole question, therefore, on this branch of the case is, whether in the year 1877, one hundred and forty dollars' worth of labor was performed, or improvements made on the Dinero claim. If not, the claim was subject to re-location in February, 1878, by defendants, otherwise not.

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On this point we find that a road was made during the year 1877, over the surface of the Dinero and Mount Diablo to be used in working the three mines, the Peru, Mount Diablo and Dinero, all at this time owned by the plaintiff, and to reach the Mount Diablo ore dump and the point on the surface of the Dinero where the winze in the connecting drift would come out when raised as was then proposed. That portion of the labor on this road done on the surface of the Dinero claim was worth from fifty to seventy-five dollars.

A survey was also made to locate the point where the winze, when raised, would come to the surface, a point within the surface lines of the Dinero. In this year Mr. Sweetapple located for plaintiff a proposed shaft at the point "R" on the Dinero ground, north of the ravine and beyond the apex of the Callison vein. This projected shaft was to be a two-compartment shaft, and was to be sunk for prospecting the Dinero ground. An advertisement for bids was made and six or eight were put in. The shaft was not begun in 1877 because, as Mr. Sweetapple testifies, the company being short of funds, decided to postpone sinking it until the following year.

All this was done on the surface of the claim; but it does not distinctly appear that the worth of it was so much as one hundred and forty dollars. It is evidence, however, of a continued purpose to hold the Dinero ground, and tends to confirm the claim of plaintiff, that all the work performed in this connection was intended to be applicable to all these three claims.

The plaintiff further shows that in prosecuting work from the main tunnel, which tunnel begins on the Mount Diablo ground, such as drifting and stoping out ore, some three thousand dollars worth of labor was done during this year within the surface lines of the Dinero, if those lines are dropped perpendicularly down. This, the defendants say, was not, properly speaking, work on the Dinero claim, but within and on the Mount Diablo lode, which in its downward course has pitched into the Dinero. The plaintiff, on the other hand, also insists that this and all other work was a part of a systematic plan applicable to all their claims.

This presents a question of practical importance for decision, which the consideration of a few additional facts may help

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us to do correctly. In the year 1867, the grantors of plaintiff Hanke and his associates, located three quartz claims at the point now in question, viz.: the Peru, Mount Diablo and Dinero, all lying side by side, with the Mount Diablo in the center—the Dinero being the *first* location. The surface of each claim was two hundred feet wide. The plaintiff and its predecessors from that time on have been in the undisturbed possession of the mining ground covered by these three claims. During the years from 1867 to 1878, when defendant entered, a large amount of work had been done by the plaintiff in and upon the claims, consisting of tunnels, drifts, winzes, crosscuts, inclines, ore stopes, and all the labor usual in the development of such a mining claim. Over ninety-four thousand dollars have been expended by the plaintiff on the claims; much the larger portion within the lines of the Mount Diablo claim.

When Hanke located these three claims, he first located the Dinero, putting up a mound on the croppings; then going south he located next the Mount Diablo, and last the Peru, putting a notice on the croppings of each. The three claims adjoin each other, and the surface area of the three together is just what the law of 1872 permits a locator to take on locating a single lode, unless the mining laws restrict him, namely: three hundred feet on each side of the center of the Mount Diablo claim. The Columbus laws do restrict the locators to one hundred feet on each side of the ledge located. At the time Hanke made his discovery and locations, he found upon the surface of all three claims black iron and manganese croppings. Ignorant of the real character of the ore deposits he believed he had found, and it being impossible, in the absence of developments beneath the surface, to determine whether these croppings were the signs of one lode or more, he made three locations. This he had a right to do. It was no more than any careful miner, desiring to secure the fruits of his discovery, would have done. Subsequent explorations have shown that valuable ore deposits exist in each of the claims so located.

The mining law providing for the peculiar mode in which the metalliferous deposits occur in the Columbus district, gave the locator a right to stick his stake at the point he supposed

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and claimed his ledge to be, and then entitled him to hold one hundred feet on each side, with all the ores and metals therein, thereby, in some degree, protecting the locator upon newly discovered croppings against his liability to mistake in selecting the spot to place his stake and notice.

These three claims, so located, the plaintiff has held and worked for more than ten years. The main tunnel starting in the Mount Diablo bears north until it penetrates the Dinero ground about one hundred and fifty feet. From this tunnel cross-cuts have been run south into the Peru and north into the Dinero, *i. e.*, across the line dividing on the surface the Mount Diablo and Dinero claims.

Some time in the year 1876 a cross-cut was made, north about forty-three feet toward the Dinero claim, some two hundred feet from the mouth of the main tunnel. From the north end of this cross-cut an incline was sunk the same year one hundred and forty-three feet, bringing the foot of the incline more than fifty feet into the Dinero ground. In 1877 drifting and stoping was carried on from and about this incline, and, according to Mr. Sweetapple—and the fact is not disputed—at least three thousand dollars' worth of this work was done on the Dinero, north of the Mount Diablo north line. A little north of the foot of this incline, a cross-cut from the drift running north was run in 1877, twelve or fifteen feet west, at a cost of over one hundred and forty-four dollars. This cross-cut is wholly in the Dinero ground as marked on the surface.

This is the substance of the testimony on this point, and upon it we are called upon to decide whether the plaintiff, in the year 1877, failed to comply with the conditions, as to labor on the Dinero claim, stated in section 2324 of the Revised Statutes, thereby leaving that claim open to re-location.

What, then, is a "mining claim," and what is "work on a claim?"

It may be answered, to the first part of the inquiry, that a "mining claim" is the name given to that portion of the public mineral lands which the miner, for mining purposes, takes up and holds in accordance with mining laws, local and statutory. It must, under the law of Congress of 1872, R. S. Sec. 2320, be located upon at least one known vein or lode, but the vein or lode is not the whole claim.

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"No claim," says the act, "shall extend more than three hundred feet on each side of the middle of the vein at the surface." A claim may therefore, if there is no restriction in the local rules, be six hundred feet wide, although the known lode to include which such claim is located is not twelve inches in width. The owners of such a mining claim have, in the language of the law, "the exclusive right and enjoyment of all the surface included *within the lines* of their locations." R. S., Sec. 2322.

Applying the law to the case in hand, the Dinero claim consists of a tract of mining ground fourteen hundred feet long and two hundred feet wide. The Mount Diablo Company being the owner of the claim, had, in 1877, the exclusive right of possession to the whole tract, so far as the surface is concerned. Below the surface the possession was subject to such right as was given by statute to the owner of an adjoining claim to follow his lode downward across his line into the Dinero ground. Assuming this definition of a mining claim to be correct, the second branch of our inquiry is easily answered; work on a claim is work done anywhere within the lines upon the surface, and anywhere within those lines below the surface, when they are carried down vertically into the earth.

Had the Dinero ground been owned by another than plaintiff, and had this three thousand dollars' worth of work been done by such other owner at the point where it was in fact done by plaintiff, there could not be, it seems to us, any pretext for claiming a forfeiture against the Dinero owners on the ground that the work done, though *on the claim*, turned out to be within a lode which had its apex outside the Dinero surface lines. We think the fact that the plaintiff was the owner of both the Mount Diablo and Dinero claim, ought not to deprive it of credit for this work done on the Dinero. It is literally and in fact work done on the Dinero claim. If an outside lode dip into the claim, the work may also be done inside of that lode, but at the same time on the Dinero claim. A mining claim, as we have seen, is not merely the vein or lode, but that with a certain quantity of surface ground. The owner has the exclusive right of possession to such surface, as well as to the veins or lodes cropping out therein.

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When the owner of a vein having its top outside the lines of such claim, follows his vein into an adjoining claim, he does so by permission of a positive law, without which he would have no more right to go upon his neighbor's claim below, than upon the surface. It is a sort of easement in, or servitude laid upon the mining claim adjoining. We therefore conclude that when a miner does the necessary labor, anywhere within his boundaries upon the surface or below it, the condition of the mining law as to labor has been complied with. We can not hold that he shall make no mistakes; that he is bound to ascertain at the risk of forfeiture, whether he is working on a lode having its apex outside his surface lines. The miner has perils and perplexities enough, without adding this. The ten dollars' worth of labor which the law requires the plaintiff to do on each one hundred feet of the Dinero claim, to save it from forfeiture, is too small to be of any practical consequence as a development of the claim. Congress plainly required this work to be done by way of a continuous, annual assertion, or renewal of the original claim and location, and nothing more. This being so, it would hurt our sense of justice did we feel compelled to say that one hundred and forty dollars' worth of labor done on the surface, utterly valueless as a development of the claim, would have saved the claim from forfeiture, and that the three thousand dollars worth of work done below the surface can not.

It is also to be remembered that the plaintiff had long been the owner and possessor of these three claims; that the precise limits of the lodes, if more than one, and the nature of the ore deposit, was and may still be said to be by no means free from doubt. A long tunnel was driven into this ground; a drift off to the south was run to prospect the Peru; on the north side inclines were sunk and drifts run, some extending into the Dinero, some not. Wherever, in the Peru, Mount Diablo, or Dinero, promise of ore appeared, there work was done, and when found the ore was stoped out.

At two different times, the last in 1874, notices were put up and one of them recorded, notifying all that the work then being done was intended for the development of the three claims.

Work done outside of the claim, or outside of any claim, if

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done for the purpose and as a means of prospecting or developing the claim, as in the case of tunnels, drifts, etc., is as available for holding the claim as if done within the boundaries of the claim itself. One general system may be formed well adapted and intended to work several contiguous claims or lodes, and when such is the case work in furtherance of the system is work on the claims intended to be developed by it.

A general system of work for the exploration of the whole ground embraced in these three sets of contiguous claims seems to have been carried on by plaintiff. And we think that all work done was a part of that general system, and, as such, applicable to all the claims which had by purchase been concentrated in a single party, the plaintiff. Under the circumstances of this case it would be little short of downright absurdity to require the plaintiff to segregate his work and proclaim the labor of removing one wheelbarrow full of earth from the common tunnel to be specifically applicable to the Dinero claim, another to the Mount Diablo and a third to the Peru. The natural and reasonable presumption is that all the work is done as a part of the system, and as such applicable to all the claims.

Finally, when we consider that the plaintiff had been in unquestioned occupation of all these claims for over ten years prior to the entry of defendants, and the amount of labor altogether done on the ground, we have no inclination, and do not deem it our duty to strain for a construction of the law or of the facts upon which to declare a forfeiture. Forfeitures have always been deemed, in law, odious, and courts have universally insisted upon the forfeiture being made clearly apparent before enforcing it. Equity often interferes to relieve against forfeitures, but never to divest estates by enforcing them.

Our conclusion is that the plaintiff is entitled to the possession of the demanded premises.

Judgment must accordingly be entered in favor of plaintiff.

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[1]RICHMOND MINING CO. v. EUREKA MINING CO.

(103 U. S. 839. Supreme Court, 1880.)

Division line must be protracted to extend as far as the dip extends. E. and R., two mining companies, in settlement of the differences between them respecting the possession of certain ground and ores therein contained, entered into an agreement establishing between specified points on the earth's surface a boundary line between their respective claims, and stipulating that E. would convey to R. all the mining ground and claim lying northwesterly of said line, including "all veins, lodes, ledges, deposits, dips, spurs and angles on, in, or under the same contained," and that R. would convey to E. all its right, title and interest in and to any and all the land or mining ground situated on the southeasterly side of said line, and in and to "all ores, precious metals, veins, lodes, ledges, deposits, dips, spurs and angles on, in, or under the said land or mineral ground." The agreement further declared that it was the object and intention of the parties to confine the workings of R. "to the northwesterly side of said line continued downward to the center of the earth." *Held*, that the agreement must be construed as protracting the boundary line through the dips of the veins or lodes wherever they may go in their course toward the center of the earth.

Error to the Circuit Court of the United States for the District of Nevada.

This is a suit in ejectment brought by the Eureka Consolidated Mining Company against the Richmond Mining Company of Nevada to recover the possession of a valuable mining property. The facts appearing in the findings, which, in the opinion of the court, are decisive of the case, may be stated as follows:

In Ruby Hill, a spur of Prospect Mountain, in the Eureka Mining District, Nevada, is a zone of limestone, running in a northwesterly and southeasterly direction for a distance of a little more than a mile. Underlying this zone on the southerly side, is a well defined, unbroken foot wall of quartzite several hundred feet thick, and with a dip to the northward of about forty-five degrees. On the northerly side is an overhanging wall or belt of shale, also well defined and generally

[1] S. C. below, 8 M. R. 144; 9 M. R. 578.

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unbroken, which dips at an angle of about eighty degrees and varies in thickness from less than an inch to seventy or eighty feet. At the easterly end of the zone these walls of quartzite and shale approach so closely as to be separated only by a seam less than an inch in thickness. From this point they diverge until, on the surface at the Eureka mine, they are about five hundred feet apart, and at the Richmond about eight hundred. At some depth below the surface they must come together if they continue to descend on the same angle, and on some of the levels that have been worked they are already found to be only from two to three hundred feet apart. This zone of limestone at some time since its original deposit, has been broken, fissured and disintegrated in all directions, so as to destroy, except in a few places of a few feet each, all traces of stratification. In this way its original structure and character became totally changed, and it was fitted to receive the extensive mineral deposits which are found in the numerous fissures, caverns and cavities, and in the loose material of the rock in various forms. Sometimes the mineral appears in a series or succession of ore bodies, more or less closely connected; sometimes in apparently isolated chambers, and again in small bodies and in scattered grains. Although barren limestone intervenes, the mineral is so generally diffused throughout the zone as to render the whole mineralized matter metal-bearing rock. Bodies of ore appear in croppings on the surface at various points throughout the whole length of the zone along which mining claims have been located. No mineral has been found either in the quartzite or the shale, and no considerable indications of any have been discovered within a mile north or south of the limestone.

In 1864 the miners of the district adopted a system of laws and regulations for their government. At that time provisions were made for ledge locations only, and in February, 1869, it was found necessary to add some amendments to meet the requirements of the district. This was done by a resolution which contained a preamble as follows:

"Whereas explorations have made it evident that the mineral in Eureka District is found more frequently in the form of deposits than in fissure veins or ledges, and the laws of the district do not provide for the location of such deposits, and

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whereas the deficiency in the law may give rise to expensive litigation, * * * the miners of Eureka District have adopted the following amendments to the old laws of the district."

The amendments were to the effect that deposit claims might be located; that a deposit claim should consist of a piece of ground one hundred feet square, and be designated as a "square;" that under certain circumstances such claims might be united, and that the owner should be entitled to all the mineral within his "ground to an indefinite depth."

On the 29th of May, 1869, after this amendment of the miners' laws, there was filed for record in the mining records of the district a "square" location of the Lookout claim, being four hundred feet northerly and southerly and two hundred feet easterly and westerly, that is to say, "one hundred feet on each side of the hill monuments for the center, and * * * on the north end of Ruby Hill." On the 20th of September, 1869, notice of a ledge claim called the Tip-Top was filed for record in the same records, and on the same day, by other parties, another claim, the Richmond, for "seven locations of one hundred feet square," and seven locations of two hundred feet each, on the Richmond ledge, more particularly described "as located and situated adjoining the Champion claim on the south, and running north from said Champion and adjoining the claim known as the Tip-Top ledge." Both the Tip-Top and Richmond claims included "all dips, spurs and angles." The Tip-Top covered six hundred feet on the ledge and one hundred feet on each side. The Lookout adjoined the Richmond on the north.

The Eureka company at some time before April 26, 1871, but at what precise date does not appear, became the owner of the Champion Nugget, At Last, and Margaret claims. The Champion, At Last and Margaret adjoined the Richmond and Lookout on the west. The Nugget adjoined the Champion, but its westerly line did not extend to the Richmond as originally located. The At Last adjoined the Champion, and the Margaret the At Last. The Nugget extended to and across the line between the zone of limestone and the quartzite, and the distance across the four claims, from the Nugget on its southerly side to the Margaret on its northerly side, is seven

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hundred feet. It was not found in terms by the court below, whether these claims extended the entire distance across the zone between the quartzite and the shale, but as it was found that the width of the zone, at the Eureka mine, was five hundred feet, and at the Richmond, eight hundred, the fair inference is that the four claims belonging to the Eureka covered substantially the entire surface of the limestone between the end lines of the Champion extended.

On the 26th of April, 1871, the Eureka company conveyed to the Richmond a triangular piece of ground in the southwesterly corner of the Champion claim, described by metes and bounds, and in the deed the following provision was made:

"But it is expressly understood and agreed that this deed does not convey, or quitclaim, or release any ores, precious metals, veins, lodes or deposits, dips, spurs or angles, not embraced within the above mentioned boundaries, and that the party of the second part (Richmond company) agrees and covenants for itself, its successors and assigns, to make no claim hereafter to any ground or ore or metals therein embraced within the Nugget, Champion, Lookout, At Last, Margaret, and other mining claims and locations now owned and possessed by the party of the first part (Eureka company), except as to that contained within the limits of the above described triangular piece of ground."

The Richmond company, in working its mine on the Richmond location and in following the vein which cropped out on that location, got under the surface of the Lookout, which was then owned by the Eureka company. Controversies arose between the two companies as to their rights under their respective claims, which resulted, on the 16th of June, 1873, in a compromise, by which a dividing line was established, and the Eureka company agreed to convey to the Richmond all the mining ground and claim lying on the northwesterly side of this line, including the Lookout claim and all veins, lodes, etc., and not to protest against any application by the Richmond company for a patent for the Richmond or other claims, provided such applications did not cross the line which was fixed. The Richmond company agreed to convey to the Eureka, with warranty against its own acts, all its right, title and

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interest in and to the mining ground situated on the southeasterly side of the line, and in and to all ores, precious metals, veins, lodes, ledges, deposits, dips, spurs or angles on, in, or under the land or mining ground or any part thereof. Then follows in the agreement this clause: "It being the object and intention of the said parties hereto to confine the workings of the said party of the second part (Richmond company) to the northwesterly side of the said line continued downward to the center of the earth, which line is hereby agreed upon as the permanent boundary line between the claims of the said parties." The line thus established was described as follows: "Commencing on the northwesterly corner of the Margaret mining ground or claim, * * * running thence in a southeasterly direction along the edge of said Margaret ground, the At Last ground and the Champion ground, to a point marked W on the map; thence southerly along the edge of said Champion ground to the northeasterly corner of the Nugget ground and thence along the edge of the Nugget ground to the northwesterly corner thereof." The point W was at the beginning of the triangular piece of ground conveyed by the Eureka to the Richmond in 1871, and from there to the Nugget ground the line was the boundary between that triangle and the Champion.

Deeds were executed to perfect the conveyances contemplated by this agreement, and on the 30th of April, 1874, the Richmond company got a patent for its Richmond claim, as surveyed, "embracing a portion of the unsurveyed public domain, with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey, not herein expressly excepted from these presents, and of five hundred and one and one half (501½) linear feet of the said Richmond vein, lode, ledge, or deposit, for the length hereinbefore described throughout its entire depth, although it may enter the land adjoining; and also of all other veins, lodes, ledges, or deposits, throughout their entire depths, the tops or apexes of which lie inside the exterior boundary lines of said survey at the surface, extended downward vertically, although such veins, lodes, ledges, or deposits, in their downward course, may so far depart from a perpendicular as to extend outside of the vertical side lines of said survey: *Provided*,

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that the right of possession hereby granted to such outside parts of said veins, lodes, ledges, or deposits, shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction that such vertical planes will intersect such exterior parts of said veins, lodes, ledges, or deposits."

Before this time, on the 16th of July, 1872, the Eureka company got a similar patent for the Champion claim, and afterwards, on the 12th of December, 1876, for the At Last and the Nugget. This suit was begun on the 27th of March, 1877, and on the 30th of the same month the Eureka obtained a similar patent for the Margaret.

The Richmond company is also the owner of the Arctic and Utah claims, the first filed for record October 4, 1876, and the last January 7, 1877.

The particular mining ground in dispute is situated within the zone of limestone which has been described, and within planes drawn vertically down through the end lines of the Champion claims patented to the Eureka company, and within planes drawn vertically down through the extreme points of the patented locations of the At Last and the Margaret claims, at right angles to the course or strike of the zone, and produced so as to follow its dip. The top or apex of the zone is within the surface lines of the patents to the Eureka company, and the zone dips at right angles to its course, and on such dip extends under the surface of the Arctic and Utah claims. The property also lies on the southeasterly side of the compromise line agreed on in the settlement of June 16, 1873, extended vertically downward so as to follow the dip of the zone. The end lines of the surveys of the At Last and Margaret claims, as patented, are not parallel with each other.

[1] The subjoined diagram represents the surface location of the respective claims. The dividing line established by the agreement of June 16, 1873, is that marked X W R.

SAMUEL M. WILSON and THOMAS WREN, for the plaintiff in error.

[1] It is same diagram found in report of the case below, 9 M. R. 579.

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HARRY I. THORNTON, *contra.*

Chief Justice WAITE, after stating the case, delivered the opinion of the court.

Upon the facts set forth in the preceding statement we have had no difficulty in reaching the conclusion that the judgment of the court below, sustaining the title of the Eureka company, was right. To our minds there can not be a doubt that the compromise line was intended to fix permanently the boundary between the mining properties of the two companies at that point. The Richmond was to confine its workings to the north and west of the line, and the Eureka to the south and east. The Eureka had already got its patent for the Champion claim, which must have been older than the Richmond, for the Richmond location was bounded on the Champion and by this patent was permitted to follow throughout their entire depth, all veins, lodes, ledges and deposits, the tops or apexes of which came to the surface within the lines of its survey. It it evident also that the Richmond company was seeking a similar patent for its Richmond claim, as, by the terms of the settlement, the Eureka was to withdraw its opposition, and in due time such a patent was obtained. The Eureka company also pushed forward its applications for patents to its other claims, and in the end got them all in the same form, and with grants of the same privileges. In this way the companies secured from the United States the right to work the entire metal-bearing rock, from the quartzite to the shale, between the end lines of their patented surveys, extended downward, and following the dip of the mineralized limestone zone. Their patents are all alike, and their rights under them the same, save only that the Eureka is confined in its operations to the southeasterly side and the Richmond to the northwesterly side of the agreed line.

In establishing this line, it is to be presumed that the parties had in view the peculiar character of the property about which they had been contending. They were settling, as between themselves, their rights to mining property, and for the purpose of carrying on mining operations in that locality. They must have known perfectly well, from the observations they had already made, that but a small part of the immense min-

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eral deposit in that zone would probably be found between the exposed surface of the limestone and the quartzites immediately underneath. What they wanted was to fix, as between themselves, their right in following what is called in the findings, "the zone of metamorphosed limestone," so as to reach the anticipated deposits in the depths below. A compromise which only settled their controversies to what was directly under the surface would have accomplished this. The Richmond wanted to be relieved from all embarrassments in getting under the Lookout, and it is to be presumed the Eureka wanted similar privileges under the surface for the Champion and its other claims. For this purpose the parties had to secure the necessary grants from the United States, and the fair inference from what was done is that the Eureka was not to be interfered with in getting what it could on the south and east of the line, and the Richmond was to have the same privilege on the north and west.

The language used is to be construed with reference to the peculiar property about which the parties were contracting. Whether the limestone was or was not within the meaning of the acts of Congress and the understanding of miners, a single vein, lode or ledge, it was all mineralized or metal-bearing rock as distinguished from the barren walls in which it was inclosed. It descended into the earth on an angle, and unless parties in working it could follow its course as it went down, they could not avail themselves to the full extent of the wealth it contained. When, therefore, we find parties contending about their rights to its possession, and finally agreeing on a line of division between themselves which shall be continued downward toward the center of the earth, the conclusion is irresistible that the line was to be extended downward through the property in its course toward the center of the earth. Anything less than this would make their settlement a mere temporary expedient to get rid of a present difficulty and leave their most important rights as much in dispute as ever. Such we can not believe was the understanding.

This disposes of the case. The Richmond company is in no condition to dispute the validity of the Eureka's patents for the At Last and the Margaret, because the end lines of the surveys are not parallel, as it has agreed with the Eureka, for

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a consideration, not to work in the limestone to the south and east of the compromise line. Upon the face of the patents, the United States has granted to the Eureka the right to all veins, lodes and deposits, the tops or apexes of which lie on the inside of its surveys as patented, throughout their entire depth, and wherever they may go, provided it keeps itself within the end lines of the surveys. The finding that the ground in dispute is within the end lines, and that the apex is within the surface lines, settles the rights of the parties between themselves, as well under their patents as under their compromise agreement.

Judgment affirmed.

1. Extent of lode location on the dip and strike with relation to apex and surface lines: *Iron Co.* v. *Murphy*, 1 M. R. 548 and cases following under APEX: *Wolfley* v. *Lebanon Co.*, 4 Colo. 112; *Post* SIDE LINES.

2. The right to follow the vein into patented ground under locations prior to act of 1866: *Blake* v. *Butte Co.*, 9 M. R. 503.

3. Cumulative evidence as to the continuity of a vein when that point had been at issue, *held*, not sufficient grounds for new trial: *Tiernan* v. *Trewick*, 2 Utah, 393.

4. In ejectment for a blind lode the surface can not be recovered: *Bullion Co.* v. *Crœsus Co.*, 5 M. R. 254.

5. Record held valid without specifying number of feet claimed: *Conner* v. *McPhee*, 9 M. R. 570.

6. Definition of lode: *Iron Silver Co.* v. *Cheeseman*, 9 M. R. 552 ; *Stevens* v. *Williams*, 1 M. R. 566; *Harrington* v. *Chambers*, 1 West C. R. 63.

7. Lode confined to side lines: *Johnson* v. *Buell*, 9 M. R. 502.

8. Apex of lode defined: *Iron Silver Co.* v. *Murphy*, 1 M. R. 548; *Stevens* v. *Williams*, 1 M. R. 557.

9. Limitation of width of lode claims: *North Noonday Co.* v. *Orient Co.*, 9 M. R. 529.

10. Location upon united croppings of two distinct veins: *Van Valkenberg* v. *Huff*, 9 M. R. 467.

11. The terms lode and vein, as used in the acts of Congress, refer to what are so called by miners; expert testimony to prove veins: *Harrington* v. *Chambers*, 1 W. C. R. 63.

12. A lode location of 2,000 feet is void for the excess if not indeed for all the ground claimed: *Hanswirth* v. *Butcher*, 4 Mont. 299.

13. Right of possession comes only from a valid location: *McKinstry* v. *Clark*, 4 Mont. 370; *Noyes* v. *Black*, Id. 527.

14. In case of a cross lode the older location holds "all the ground in the space of intersection including the ore in the cross vein": *Pardee* v. *Murray*, 4 Mont. 270.

15. Location can not be made by discovery shaft on prior claim: *Upton* v. *Larkin*, 6 Pac. R. 66; *Armstrong* v. *Lower*, 6 Colo. 393; or by shaft out side of the claim: *McGinnis* v. *Egbert*, 5 Pac. R. 652.

See APEX, DIP, LOCATION, SIDE LINES.

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TABBART, EX PARTE.

(6 Vesey, Jr., 428. Hign Court of Chancery, 1801.)

Contract approved for working lunatic's coal. Agreement by the committee of a lunatic, that coal under the lunatic's estate should be worked by the owner of the adjoining land, established, under the circumstances.

Upon a petition in lunacy it appeared that the lunatic was tenant for life without impeachment of waste; remainder to his first and other sons in tail, with various remainders over. The lunatic was unmarried. Coal was found upon the estate, but in too small a quantity to justify sinking a shaft; but it was capable of being worked by means of a shaft in the adjoining land. Part of the estate of the lunatic was in mortgage, and the mortgagee was in possession; which reduced the income of the lunatic considerably. There were also other debts without any fund to answer them. Under these circumstances the committee agreed with the owner of the adjoining land to work the coal, which the master reported to be for the benefit of the lunatic. The master was attended by the next of kin, who were served with notice by the direction of the late Lord Chancellor (Loughborough).

The prayer of the petition was that the report may be confirmed.

Lord Chancellor (ELDON).—This is under singular circumstances. The next of kin have an interest that the coal shall be worked. The heir at law has no interest, there being various remainders over. Under these circumstances I think it may be done by the committee. It is like cutting timber.

[1] *Bromfield, ex p.*, 1 Ves. Jr. 453, and notes to Sumner's Ed.

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ROWLANDS v. EVANS.

WILLIAMS v. ROWLANDS.

(31 L. J. Ch. 265. Rolls Court, 1861-2.)

Lunatic partner—Dissolution—Sale. A firm was established to work a mine; each partner, after notice, was to be at liberty to sell his share, which the continuing partners were at liberty to purchase. The first partner gave notice to sell his share. The second partner afterward became a confirmed lunatic, and the third partner then purchased the share of the first, and filed his bill for a dissolution of the partnership. The committee of the lunatic then filed a cross-bill, and insisted upon the clause of pre-emption, and a right to participate in the purchase: *Held*, that the partners ought not to be compelled to carry on business with a lunatic or his committees; that the partnership must be dissolved; that notice of sale by one partner to the other before his lunacy, was sufficient to bind his committees, and determine any right of pre-emption; but that the real value of the undertaking could only be ascertained by a sale of the whole as a going concern.

By a deed dated the 13th of December, 1856, David Jones, William Evans and David Williams mutually agreed, under the style of "The Llantrissent Iron Ore Company," to work in partnership the "Hematite Iron Ore," lying under a part of the Y Fferm and Hendy farms, in the parish of Llantrissent, in the county of Glamorgan, for a period of sixty years, from the 22d of November, 1856, the term for which they had obtained a lease; that the shares in the mines and premises, and profits and loss, should be held by the partners in three equal shares; that each of them, the said Messrs. Jones, Evans and Williams, would at all times diligently employ themselves in the business of the copartnership; that the shares of the partners might be disposed of to any copartner or other persons whomsoever, and such persons should, upon any disposition, become partners in the same manner as if they had been parties to the deed; and the partners disposing absolutely of their shares and interest, should immediately cease to be partners, and should be freed from all further claims and liabilities, provided, that on the voluntary sale for value of any such shares or interest, whether by public auction or private contract, all or any one or more of the copartners should have

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the right to take and purchase the same for such price or sum as should be last bidden or offered for the same; and provided also, that any such purchaser who should not be one of the previous copartners should be approved by the company before any such sale could be effected; and provided also, that such last mentioned purchasers and all other persons so entitled to become partners as aforesaid, should execute all deeds binding themselves to the performance of the covenants; that all differences and disputes arising during the said term should be decided by a majority of votes, each partner to have one vote in respect of his third share; that if either of the copartners should die during the copartnership, his executors and administrators should be entitled to such sums of money as the share of the deceased partner of the capital and property of the copartnership should, upon the then last general annual account amount to, or as such share would have amounted to in case such account had been taken on the 31st of December immediately preceding such death; and in either case the executors of the deceased partner should also be entitled to an allowance after the rate of £5 per cent. per annum upon the capital or share of capital property, as the case might be, of such deceased partner, in lieu of profits, from the commencement of the copartnership, or from the last general account, to the time of such death; and the surviving partner, his executors or administrators, to pay such allowance, in lieu of profits, on demand, and within six months secure by bond the payment of the principal with interest, and indemnify his estate from debts, etc., on having the share vested in the surviving partners; but in case the surviving partners should decline to purchase the share of the deceased partner, the property was to be sold, and the money divided.

D. Jones afterward sold his share in the mine to John Fothergill Rowlands; and by an indenture, dated the 31st of December, 1857, D. Jones, with the consent of Messrs. Evans and Williams, assigned all his share in the mine to Mr. Rowlands, who was formally admitted into the partnership for the residue of the term comprised in the lease, but subject to the provisions of the deed of partnership of the 13th of December, 1856.

On the retirement of D. Jones, the accounts were made up, and the business was continued by the new partners.

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In October, 1858, D. Williams became of unsound mind; and on the 29th of May, 1860, Sarah Williams and Elias James were appointed committees of his estates.

By a deed dated the 15th of October, 1859, W. Evans, in consideration of £6,000, assigned his third share in the mine, and in all the partnership plant, stock and effects, moneys, and securities for money, to Mr. Rowlands, from the 15th of August, 1859; and J. F. Rowlands covenanted to indemnify W. Evans from all claims which might be made on behalf of D. Williams, his committees, or his executors, administrators or assigns, in respect of his interest in the mine or the partnership.

By an indenture dated the 31st of December, 1859, after reciting an agreement to sell one half of the share purchased of W. Evans to R. Simpson for £3,000, and that in consequence of the lunacy of D. Williams, his consent had not been obtained that R. Simpson should become jointly and equally interested in such share, J. F. Rowlands covenanted that he would use his best endeavors to get R. Simpson admitted a partner in the undertaking, and afterward, in consideration of £3,000, Mr. Rowlands, so far as he could, assigned to R. Simpson one half of the one third share purchased of W. Evans.

The suit of *Rowlands* v. *Evans* was instituted on the 9th of October, 1860, by J. F. Rowlands against all the parties to the second suit, and after stating the facts and that D. Williams was in a hopeless state of lunacy, without probability of recovery, and that important questions had arisen in reference to the mining operations and the profitable development of the business, and that great inconvenience had arisen from the inability of D. Williams to attend to business, and that there was no probability of his being able to discharge the obligations cast upon him by the partnership contract, he prayed that the partnership might be dissolved and the accounts taken, and that, if necessary, a receiver might be appointed.

The suit of *Williams* v. *Rowlands* was instituted, with the sanction of the lords justices, by the committee of D. Williams, by him through his committee and as next friend, against J. F. Rowlands, W. Evans and R. Simpson. The bill alleged that the partnership was for the purpose of getting and selling the iron ore from the mines, but that the business

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had never been a trading partnership; that it required very little judgment, but only ordinary care and skill, as the mine was open, so that the ore, which was many feet thick, might be easily got and sold at remunerative prices; that the agreement to sell the share of W. Evans was made without affording the estate of D. Williams the benefit of the right of pre-emption secured to the partners, and that it would be for the benefit of the estate of D. Williams that the right of pre-emption of the share of W. Evans should be exercised on behalf of his estate, as there were ample funds for that purpose; that R. Simpson, when he purchased, had notice that D. Williams had a right of pre-emption, and that he had not had an opportunity of exercising it. The bill also complained that the mine had not been duly worked or the ore sold advantageously, and it prayed for the appointment of a manager, for an account of the receipts, dealings and transactions since the 31st of December, 1857, and that the estate of D. Williams might have the benefit of the contract to purchase the share of W. Evans to the extent of one half of such share, or, at any rate, to share equally with J. F. Rowlands the sum of £1,000, which the bill alleged R. Simpson had paid to J. F. Rowlands beyond the purchase money of £3,000.

The principal evidence related to the right of pre-emption claimed on behalf of the estate of D. Williams. Mr. Evans said that previous to the lunacy he had mentioned to D. Williams that he intended to sell his share, and that there was no proposal by either to purchase the share of the other; that he afterward repeated his determination to sell in the presence of Mr. and Mrs. Williams, and advised them to pursue a similar course, but that D. Williams then made no proposal to purchase; that after the malady of D. Williams, but before he was found lunatic, W. Evans received one or two letters requesting him to name the price he desired to obtain for his share, but that he believed he stated in reply that he considered he was entitled to make as much money as he could in accordance with the arrangements referred to; that after the lunacy he told Mrs. Williams that he intended to sell his share to J. F. Rowlands for £6,000, to which she made no objection whatever, but merely observed, "I can not blame you for doing so." This last statement Mrs. Williams in her

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evidence denied positively, and said that she had no notice directly or indirectly of the sale until she was served with a copy of the bill in *Rowlands* v. *Williams*.

Mr. SELWYN and Mr. C. S. COLT, for J. F. Rowlands.

The Solicitor General, Sir R. PALMER and Mr. SOUTHGATE, *contra*.

THE MASTER OF THE ROLLS.—The right course apparently is to direct that the property shall be sold, and at the same time to give every party to the cause power to bid for the purchase. The court must then appoint some persons other than the parties to have the conduct of the sale, and the committees of the lunatic may buy if they think fit. The difficulties are these: It is impossible for the court to compel a party to carry on a partnership with the committees of the lunatic, if he is to bear his share of the expense or have a voice in the management, should there be any contest between them, to have every question determined contentiously in the court of chancery, with the chance of an appeal. Every question—the expenditure of £500 at a particular place; whether an engine should be put up; the making of a particular shaft, and the angle at which it shall be put; all such questions might, every month, be brought before the lords justices, and might be carried to the House of Lords. That would be ruinous. I will venture to say that if a share in a mine were to be put up for auction, with the information that it was to be carried on in partnership with the committees of a lunatic, nobody would bid for it. I do not think that this point is touched by any decision; the difficulty, however, is, that this court can not compel a party to be in this situation, either to carry on the business with the committee of a lunatic, subject to all the necessary inconveniences which arise from the circumstances, such as the necessity of having a manager appointed, and any question on which a difference might arise determined by expensive and contentious proceedings in the court of chancery, or to have the share of the lunatic determined by ascertaining what a stranger would give for it, when, if the stranger bought, he must come in under the very diffi-

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culties which the court would not compel the continuing partner to remain in, and therefore I think that the value should be ascertained properly by auction, and that some indifferent person, well acquainted with these matters, should be directed to sell the property, and that all parties should have liberty to bid. Then if the committees of the lunatic should think proper, having obtained the authority of the court for that purpose, to get any person to assist them, they may purchase There must, therefore, be some person appointed by consent between all the parties to the cause for the purpose of conducting the sale, and it must be a person well acquainted and conversant with the sale of mining property, or else the court must, in chambers, ascertain some one fit to be appointed for that purpose. I must, therefore, direct a dissolution of the partnership and the usual accounts, and appoint a receiver and manager in the meantime, as the property must be sold as a going concern.

After further argument on the right of Mr. Williams to purchase the share of Mr. Williams, it was held November 23d by the Master of the Rolls—

The only question which remained to be determined was, whether the lunatic's estate was entitled to be considered as having a right of pre-emption in respect of the share of Mr. Evans. This share had been sold to Mr. Rowlands, who took one half of it, and Mr. Simpson was to take the other half, and, in fact, gave a premium of £1,000 for the half which he took. Upon looking at the answer of Mr. Evans and the affidavit of Mrs. Williams, I am of opinion that there is no such right of pre-emption in the lunatic's estate. In the first place due notice was given to Mr. Williams, before he became a lunatic, of the intention of Mr. Evans to sell his share. Mr. Williams then said, "If I do not approve of the person you propose to bring in I shall be glad to know what the price is, for I shall take the share myself." On another occasion, in September, he stated his intention somewhat more strongly. Then the sale took place, but before it did take place he became in a situation in which it was impossible for him to exercise any option at all in the matter, and from the evidence it appears that his unsoundness of mind is the most hopeless species of insanity which can affect anybody, as it arises from

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general paralysis. In consequence, from inability, he took no step, but I am disposed to think that the notice which was given to him would bind his committees. They were not appointed for a long time afterward; but the persons who are appointed had, as Mr. Evans alleges, distinct notice of the fact and, as Mrs. Williams alleges, no notice at all. In that state of the case, considering it is proved that notice was given to the lunatic before his lunacy, I am of opinion that I must adopt the rule which has been adopted in former cases and believe that each person is speaking the truth, and that the conversation as to the notice did actually take place, which is sworn to by Mr. Evans, and that Mrs. Williams has forgotten it; in which case she, no doubt, was speaking strictly the truth when she said she had no notice until the bill was filed. That is the only mode of solving these cases, and it is the only mode to avoid the possibility of coming to the conclusion that there is distinct and willful perjury. The order, therefore, must be as I stated, for a sale of the mine in the terms stated yesterday.

IN RE MARY SMITH, a lunatic.

(Law Reports, 10 Ch. App. 79. High Court of Chancery, 1874.)

[1] **Agreement for benefit of lunatic affirmed in chancery—Lease of minerals for a gross sum treated as a sale and conversion of the realty.** A, B and C were tenants in common, in fee. C became of unsound mind. A and B sold part of the land and conveyed their shares to a purchaser. They also granted a lease of the minerals under other parts in consideration of a gross sum payable by installments within a limited time. They also covenanted that C should concur, and that they would hold her share of the minerals in trust for her.

B afterward became also of unsound mind, and A sold other parts of the land and made like leases of minerals for like consideration, covenanting that B and C should concur, and that he would hold their share of the moneys payable, in trust for them. B and C were both found lunatic by inquisition, and the court confirmed the sales and leases and ordered the committee to execute the deeds.

C died leaving B her heir at law and sole next of kin. Afterward B died also: *Held*, that the leases were in the nature of absolute sales of real estate; that the confirmation of the sales and leases were sales un-

[1] *Awdley* v. *Awdley* 2 Vern. 192; *Lloyd* v. *Hart*, 2 Pa. St. 473.

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der the 124th section of the Lunacy Regulation Act of 1853, and that as between the real and personal representatives of B, the proceeds, both of the sales and the leases, effected after B became of unsound mind, belonged to her heir at law as real estate; but that as to the shares both of B and C in the proceeds of the sale and lease in which B concurred, they were converted into personalty and belonged to B's next of kin.

In this case petitions were presented by the heir at law, and by the legal personal representative of Mary Smith, a lunatic, deceased, raising the question whether certain parts of her property were real or personal estate.

George Smith, the father of the lunatic, by his will dated the 21st of March, 1831, gave his residuary real and personal estate to his son and daughters, Samuel Smith, Martha Smith, Mary Smith, and Sarah Smith, their heirs, executors, administrators and assigns respectively, as tenants in common.

The testator died shortly after the date of his will.

Previously to the year 1853, Martha Smith became of unsound mind, but was not so found by inquisition. By an indenture dated the 13th of January, 1853, in consideration of £1,500 paid to Samuel, Mary and Sarah—as to three fourths for their own use, and as to one fourth in trust for Martha—Samuel, Mary and Sarah, demised certain portions of the real estate, with power to work the entirety of the mines, to Messrs. Hickman for thirty-one years, reserving a mining rent of £487 10*s.* every half year until the 24th of June, 1861, and upon the 25th of December, 1861, £450, after which no further rent was reserved, with a proviso that they should hold one fourth part of the moneys so paid for the security of themselves in respect of the covenants entered into by them for the ultimate confirmation of the demise by Martha, and for quiet enjoyment in the meantime, and subject thereto in trust for Martha.

On the 13th of October, 1853, Samuel, Mary and Sarah, sold certain other parts of the real estates and the mines under them. By the deed of conveyance they conveyed their undivided three fourths to the purchaser, and covenanted that Martha should convey her share, and that they would stand possessed of one fourth of the purchase money in trust for her.

On the 8th of December, 1854, Mary having then also be-

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come of unsound mind, although not so found by inquisition, Samuel and Sarah sold another portion of the real estate with the mines under it. By the deed of conveyance they conveyed their two undivided fourth parts to the purchasers, and covenanted that Martha and Mary should convey their shares, and that Samuel and Sarah would hold two fourths of the purchase money in trust for them equally.

By an indenture dated the 8th of July, 1855, in consideration of £337 10*s.* then paid to Samuel and Sarah, as to two fourths thereof for their own use, and as to two fourths in trust for Martha and Mary, and in consideration of £1,600 6*s.* 3*d.* to be paid to the same persons in the same manner, at the times thereinafter mentioned, Samuel and Sarah demised their two fourth shares in certain other parts of the real estates, and in the mines and minerals thereunder (with power to work the entirety of such mines and minerals) to David Jones for twenty-one years, reserving by way of mining rents upon every 25th of March and 29th of September, up to the 29th of September, 1859, £168 15*s.*, and £81 11*s.* 3*d.* on the 25th of March, 1860, with a proviso that the two lessors should stand possessed of two fourths of the moneys payable under the lease upon trust for the protection of the lessors against the covenants therein contained for the eventual demise of the shares of Martha and Mary, and for quiet enjoyment thereof in the meantime, and subject thereto upon trust for Martha and Mary equally.

Sarah Smith died on the 23d of June, 1856, having by her will given all her real and personal estate to her brother and sisters, Samuel, Martha and Mary, in equal shares.

On the 29th of August, 1856, the 27th of April, 1858, and the 17th of July, 1860, Samuel Smith sold and conveyed other small portions of the real estate in a similar way, covenanting to stand possessed of two thirds of the purchase money in trust for Martha and Mary.

By an indenture dated the 18th of May, 1860, Samuel Smith demised a further portion of the estates to P. Roberts and E. Yardly for the term of twelve years, with liberty to work the mines, paying a surface rent of £9 17*s.* 6*d.*, and the sum of £373 2*s.* 6*d.* on the execution of the indenture, and a further sum of £1,650 by half yearly installments of £150 each;

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with a proviso that he should stand possessed of the two thirds of the said several sums in trust for Martha and Mary equally.

Samuel Smith died on the 27th of September, 1861, having appointed J. F. Adams his executor.

In January, 1862, Martha Smith and Mary Smith were both found lunatics by inquisition. The same committee was appointed of both estates.

A bill was filed by the committee against J. F. Adams praying an account of all moneys received by Samuel Smith or his executor for the benefit of Martha and Mary, and for an inquiry whether it would be for the benefit of the lunatics to adopt and confirm the before mentioned sales and leases.

This suit was compromised by two agreements, dated the 14th of November, 1866, by which it was agreed, among other things, subject to the sanction of the court, that the several sales and leases should be confirmed, and that the defendant should pay to the committee the sum of £5,056 19*s.* for the proportion payable to Martha Smith of the moneys arising from the before mentioned sales and leases, and a like sum for the proportion payable to Mary Smith.

Martha Smith died in February, 1867, intestate, leaving Mary her sole next of kin and heiress at law, and the committee of Mary's estate was appointed her administrator.

By an order of the lords justices, dated the 5th of August, 1867, and made both in the chancery suit and in lunacy, the court ordered the compromise to be carried into effect, and that out of the two sums of £5,056 19*s.* each, when paid to the committee, two sums of £2,536 15*s.* 10*d.* each, which represented the shares of Martha and Mary in moneys arising from the sales of real estate, should be carried to the "real estate account," in the matter of the lunacy of Mary Smith, and two sums of £2,503 2*s.* 10*d.* each, which represented the shares of Martha and Mary in moneys arising from the leases of the mines, should be carried to the "mineral account" in the same matter.

Mary Smith was now also dead. She left a will made before she became of unsound mind, and petitions were presented by her heir at law and the administrator with her will annexed, respectively, claiming the two funds standing to the "real estate account" and the "mineral account."

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Mr. J. PEARSON, Q. C. and Mr. EVERITT, for the heir at law.

Mr. INCE, for the legal personal representative.

Mr. EYRE appeared for the next of kin, but the court held that he had no *locus standi*, and declined to hear him.

Sir W. M. JAMES, L. J.

I am of opinion as to both the sums in question that the heir at law is entitled to them as real estate. I start with this principle, that this court, whether we or our predecessors were sitting here, must be assumed and presumed to have acted rightly and lawfully, and not to have done anything that it could not rightfully and lawfully do. It had no power to deal with the lunatics' real estate except under the provisions of the act of Parliament to which we have been referred. To a certain extent this court can deal with real estate, with regard to timber, for instance, which was the subject of one of the cases referred to by Mr. Ince; that is, if in the due management of the estate it is necessary to cut down timber which is too old, or which it is desirable to cut down for the benefit of other timber, then that would be understood as done in the due management of the estate, like cutting a crop of hay. Of course in that case it is converted into a chattel, the value of which belongs to the personal estate. But to dispose of a piece of fee simple land, or to dispose of a whole wood upon the land, or the whole minerals under it, is in fact disposing of the lunatics' real estate in substance, and the court must be assumed to have dealt with the lunatics' real estate under some statute authorizing them in that behalf.

Now how did it happen in this case that the thing was done? Persons of sound mind being tenants in common with persons of unsound mind, deal with the property in such a way as that the whole property is entered upon by a stranger. That, no doubt, was either a trespass or a conversion of the property of persons of unsound mind, for which there was no legal defense, and which would entitle those persons to bring an action of trespass or trover, or file a bill for an account against their co-tenants in common. Such an action would have been a

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personal action. Instead of doing that, and disturbing the arrangement which was for the benefit of everybody, it was considered by this court, confirming the report of the master, that it was better for the lunatics that the arrangement which had been made by the persons of sound mind should also be made on behalf of the lunatics; that is to say, it was considered by this court desirable for the lunatics to concur with the persons of sound mind in selling the property which had been sold, receiving their share of the purchase money. The fact that the arrangement had been already made, and the conveyance executed by persons of sound mind, can not make any difference. The court did approve of the committee of the lunatics concurring with other persons in making a conveyance of the lunatics' shares, the lunatics receiving the proper proportion of the purchase money. It can make no difference that there had been a suit in chancery upon the subject as between the lunatics and the representatives of the persons of sound mind. That is only a part of the history of the case. Under those circumstances it was considered better to make the sale, and it was made accordingly. There can be no question whatever with respect to the proceeds of that which was sold in fee simple.

Then, it appears to me, when we consider what was done with regard to the mines, that there is substantially no difference between those dispositions and the others. They were not really leases of mines—not what in common parlance would be called leases of mines, nor such as this court would ever make when granting leases of mines. The court never takes a gross sum down, which would be in the nature of a premium or fine for granting a lease, leaving no rent hereafter. It was, in fact, in each case, a right to take the minerals for a certain term of years, upon the payment of a gross sum; not, indeed, a sum payable at once, but payable by installments at periods which extended over some years. In fact, there was left a term of years still remaining, during which the right of the lessee was to continue. He had no legal right under it. He might have been stopped by the lunatic tenant in common at any time, but there being the thing still to be worked, the property still ungot, and the one sum to be paid for it, the court said: "We are of opinion it is for the interest of the

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lunatics to concur with the other tenants in common in making a conveyance or grant of the mines, part of the real estate of the testator, for a sum of money down." That sum of money so paid down is purchase money for that interest, and to be dealt with exactly in the same way as the 135th section says fines and premiums are to be dealt with, and is as much real estate as the other sum, and both sums must be dealt with as real estate, and paid to the heir at law. That is, however, subject to this, that whatever Mary, the sister who was of sound mind, granted or professed to grant, with regard either to her own or Martha's share, is bound by what Mary so did, and it was utterly impossible for her to dispute it afterward when she survived and became heiress at law. The proceeds of Martha's share must be considered as personal estate. There will be no difficulty in ascertaining how much is due to that part which will go to the legal personal representative and the other part which will go to the heir at law.

Sir G. MELLISH, L. J.

I am of the same opinion. It appears to me that we have really to discover which are the sections of the act under which our predecessors acted when they confirmed the sale of the real estate and the leases of the mines.

With respect to the sale of the real estate, I am clearly of opinion they made that confirmation under the 124th section. By that section it is provided that when the lunatic is entitled to an undivided share of land, and it appears to the court expedient that the sale of the land should be made, the court may concur on behalf of the lunatic with the other tenants in common in making a sale. It appears to me that is what the court did in this case. It is true that the tenants in common made the sale on behalf of the lunatics previous to the commission under which Martha and Mary were declared lunatics, and the court, on their behalf, considered what was best to be done, and what the court did was to concur in the sale already made. I am of opinion that the court had power, just as they might have concurred in a sale then to be made, to concur in a sale which the other tenants in common had previously made. That is what I think they did. Then the concluding

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part of the section says that the proceeds of the sale are to be considered as part of the real estate. I come to the conclusion also (although there is more difficulty about that), that the same observation really applies to the mines. The court must have acted under the 124th, the 130th or the 131st section in confirming the lease of the mines. I think it could hardly be a lease under the 130th section. That enables the court, where a lunatic is entitled in fee to an open mine, to make a lease of that mine, for such a term of years, with such rents, royalties, reservations, covenants and agreements as the lord chancellor shall order. If the court acted under that section, they would clearly reserve a yearly rent or royalty, and whatever part of the rent or royalty became due during the lunatic's lifetime, would be personal estate, and the heir would be entitled to any rent or royalty which became due after the death of the lunatic. But if this was to be considered as a lease under this section, the heir would be entitled to the mine—to the legal estate and the reversion in it—but no part of the proceeds would belong to him. I do not think it can properly be considered a lease under the 130th section, and there is also a difficulty in taking it under the 131st section, supposing it is to be considered as an unopened mine. It appears to me, with regard to the other mode of dealing with the minerals or the surface of the land, that the covenant as to the minerals is not such an one as the court would have assented to if it had been asked in the first instance what sort of lease should be made of the lunatics' mines, either open or unopened. In substance, the court really confirmed a sale of the lunatics' mines; that is part of the lunatics' real estate, which had been made by the tenants in common, and therefore that must follow the same rule as the sale of the real estate itself.

I also agree with what the lord justice has said as to the particular contracts made with Mary.

Their lordships ordered that the costs of and relating to the sales should be paid out of the real estate, each party to have his own costs of the present application.

Solicitors for the appellants, Messrs. S. F. MILLER & SON, agents for Mr. J. H. Thursfield, Wednesbury.

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Solicitors for the respondent, Messrs. CLARKE, WOODCOCK & RYLAND.

1. The court has power, under the Lunacy Regulation Act, 1853, S. 124, to make an exchange of the land of the lunatic without the minerals under it: *In re Dicconson*, L. R. 15, Ch. Div. 316.

2. Authority of court to regulate cutting of timber on lunatic's land: *Bromfield, ex p.*, 1 Ves. Jr. 453; *Oxenden* v. *Compton*, 2 Id. 69.

3. Lunatic liable for injuries caused by defective condition of his real estate: *Morain* v. *Devlin*, 132 Mass. 87; 42 Am. R. 423.

4. Contracts of lunatic voidable—not void: *Copenrath* v. *Kienby*, 83 Ind. 18.

5. Inherent power of courts of equity to order sale of lunatic's estate: *Dodge* v. *Cole*, 97 Ill. 338; 37 Am. R. 111.

6. Insane vendor may rescind without restitution, where his condition was known to vendee: *Crawford* v. *Scovell*, 94 Pa. St. 48; 39 Am. R. 766.

7. General discussion of the extent of the validity of contracts of insane persons: *Northwestern Ins. Co.* v. *Blankenship*, 94 Ind. 535; 48 Am. R. 185.

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FREMONT V. MERCED MINING CO.

(9 California, 19. Supreme Court, 1858.)

Injunction modified—What not a contempt. When an injunction, granted on an *ex parte* application, was modified on motion of defendant, without notice to plaintiff, on defendant's giving bond: *Held*, that subsequent acts of defendant, in violation of the original injunction, were not in contempt.

[1] **Remedy by appeal.** The remedy of the plaintiff, *if there was error in the order modifying the injunction*, is by appeal. but he can not have a mandamus to compel the issuance of attachment for contempt.

MANDAMUS.

Application to this court for a *mandamus* to compel the district court to issue an attachment for contempt. The facts appear in the opinion of the court.

HEYDENFELDT, for plaintiff.

BURNETT, J., delivered the opinion of the court, TERRY, C. J., concurring.

Application for mandamus. The plaintiff commenced his action in the District Court of the Thirteenth Judicial District, and upon his *ex parte* application an order was made by the judge granting an injunction restraining the defendant from working certain quartz veins. After due service of the injunction, the defendant, without notice to the plaintiff, applied for a modification of the order, which was granted by the judge upon the filing of a bond by defendant in a sum specified. After the order was made modifying the order granting the injunction, the defendant went on to work the quartz veins mentioned, and the plaintiff, upon the proper affidavit, made application to the judge for an attachment for contempt. This application was refused, and the plaintiff now

[1] That mandamus will issue to compel an attachment for contempt, where the facts justify it, was held in a case between the same parties: 7. M. R. 309.

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applies to this court for a mandamus to compel the judge of the court below to issue the attachment, and hear the case of the alleged contempt.

The judge very properly refused the application for the attachment. The order granting the injunction having been modified, there was no contempt committed. The judge had a right to modify the order, under the provisions of section three hundred and thirty-four of the Practice Act: 8 How. Pr. 440. If the judge erred in making the order, the remedy of the plaintiff was by appeal: Sec. 347.

Application denied.

STATE EX REL. ELLIOTT V. GUERRERO ET AL.

(12 Nevada, 105. Supreme Court, 1877.)

Remedy at law. Mandamus is not the proper remedy where the relator has a plain, speedy and adequate remedy at law.

[1] **Where relator claims that he is entitled to stock certificates** which the trustees refuse to issue to him, he has his action against the corporation for the value of the stock, and mandamus will not be allowed.

Where there are sundry claimants to stock, a mandamus ought not to be granted to compel its issue to any one of them.

Application for a writ of mandamus.

R. H. TAYLOR, for relator.

ROBERT M. CLARKE, for respondents.

By the Court, LEONARD, J.

This is an original application to this court for a mandamus to compel respondents, as trustees of the Roman Capitol Gold and Silver Mining Company, a corporation incorporated and existing under the laws of this State, and having its principal office at Virginia City, to cause to be issued to relator seventeen hundred and ninety shares of the capital stock of said company.

[1] *Durham* v. *Monumental Co.*, 9 Or. 41; *Kimball* v. *Union Water Co.*, 44 Cal. 173; *Townes* v. *Nichols*, 73 Me. 515.

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The petition avers that on the sixth day of June, 1876, one Leopoldo Pucci obtained a judgment in the first judicial district court in this State against one B. Guerrero, for the sum of nine hundred and thirty-nine dollars and sixty-six cents, and ninety-two dollars and ninety-five cents costs; that execution was duly issued, and stock belonging to said Guerrero, and standing in his name on the books of said company, was duly levied upon and thereafter sold by the sheriff of Storey county to relator and his assignors; that relator is now the legal owner of all of said stock, and is legally entitled to have the same issued to him; that it is the duty of respondents to cause the certificates of such stock to be issued to him in due form; that relator has demanded of respondents the issuance of the same to him, but a majority of respondents refuse to issue, or cause to be issued, said certificates of stock or any part thereof.

Answering relator's petition, the respondents deny the levy and sale by the sheriff. They further deny as follows: That at the time of the alleged levy and sale, or at the date of said judgment, the said Guerrero was the owner of said shares, or certificates of stock, or any part thereof, but aver that at the said several dates said stock was the property of three certain persons named; that relator is legally entitled to have any of said stock issued to him; that it is the duty of respondents to issue or cause to be issued, said stock to him.

Respondents also aver that relator was never in possession of any of said shares or certificates of stock; that he never presented any of the same to the secretary of said company, or demanded that it be transferred to him on the books of the company; that at the time of the alleged levy and sale the stock was in the possession and was the property of other persons, and was not the property of said Guerrero; that new certificates in lieu of the original certificates had been issued and delivered to other persons, without notice of the claim of relator or his assignors; that the new certificates are yet outstanding, and are claimed by other persons as their property. At the hearing, upon the order of this court to respondents to show cause, certain evidence was introduced by relator, but in view of the opinion entertained by us concerning the case it is unnecessary to review it.

We are of the opinion that mandamus is not the proper remedy, for the reason that relator has a plain, speedy and ade-

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quate remedy at law by an action against the corporation for the value of the stock claimed: 2 Cowen, 444; 10 Johns. 484; 10 How. Pr. 544; 1 Abb. Pr. 128; 2 Doug. (K. B.) 526; 3 R. I. 22; 44 Cal. 173; 40 Cal. 281; 10 Wend. 399; 4 Conn. 172; 6 Hill. 243.

It is not claimed that these shares or certificates of stock possess any peculiar value; that is to say, any value beyond that of the same number of other shares of the company. Such being the case, the stock in question is a subject of pecuniary value only, capable of being fully compensated for in damages: 3 R. I., 22; 10 Johns. 484, *supra.*

It is, however, argued by relator that an action against the corporation would not be an adequate remedy; that a judgment against the corporation would be, in part, against himself; that is to say, if relator is the owner of one thirtieth of the capital stock, as claimed by him, that he would have to pay one thirtieth of the judgment. But this conclusion does not follow. If he owns no other stock in the company, he certainly would not be subjected to the injury stated, for the reason that he would have no stock outside of this to assess, or to be affected in any other way; and as to the stock in question, if his claim is a valid one, he has a perfect remedy against the corporation for its value. If he has other stock in this company (which fact does not appear), that can not be a foundation for giving him a remedy refused to all other parties whose stock the company will not transfer: 10 How. Pr. 551; 44 Cal. 175.

There is an additional reason why the writ should be denied. The stock demanded by relator is claimed by other parties as their property, and those persons are not before us. The present proceeding is a very imperfect mode of trying questions touching their rights. If the stock belongs to those persons, certainly respondents ought not to be required to cause it to be issued to relator, and if this court should order it to be so issued it would be an indirect recognition of relator's superior rights thereto, without the presence of such persons, and without all the facts affecting their rights before us.

Mandamus denied.

1. Mandamus to compel issue of injunction to stay waste, discretionary: *People* v. *Judge*, 38 Mich. 244. *Post* WASTE.

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2. Mandamus lies to compel sheriff to execute writ of restitution of a mine: *Fremont* v. *Crippen*, 6 M. R. 221.

3. Mandamus to compel the collection of certain school and other taxes upon the proceeds of mines: *State* v. *Gracey*, 11 Nevada, 223.

4. Mandamus to compel the transfer of mining stock, refused: *Durham* v. *Monumental Co.*, 9 Or. 41; he can purchase other shares in market and recover the price against the company: *Townes* v. *Nichols*, 73 Me. 515.

5. Mandamus will not lie to control the action of the land department is issuing patents: *The Secretary* v. *McGarrahan*, 9 Wall. 298.

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BOYD v. MERRIELL.

(52 Illinois, 151. Supreme Court, 1869.)

Husband signing wife's name without authority. A man, by signing his wife's name to articles of association without any authority from her, does not thereby make her a member of the association, nor is she thereby rendered liable for the value of services. afterward rendered at the instance of the association, by a person in examining mines.

Parties omitted in suit against association. The name of a woman signed to articles of association without authority may properly be omitted in a suit against the members of the association for services.

Joint liability of individual and association. If an individual is employed by an association to examine mines, a person who acts with the association, though his name is not signed to the articles of association, may become jointly bound with the members for such services.

Appeal from the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

DENT & BLACK, for the appellant.

BONNEY, FAY & GRIGGS, for the appellee.

JUSTICE WALKER delivered the opinion of the court.

This was an action of assumpsit, brought by appellee against appellant, and several other persons, to recover the value of services rendered by appellee in traveling and examining silver mines in Colorado Territory, and for expenses incurred in performing the service. Appellant, only, appeared and defended the action, and judgment by default was rendered against the other defendants, upon whom service was had, and others not having been served, no proceedings were had against them. The declaration contained only the common counts for work and labor rendered, money paid, laid out and expended. Appellant filed the plea of the general issue, and a plea, verified by affidavit, denying his joint liability with his co-defendants. Issues were formed upon these pleas, and the cause was submitted to the court for trial, with-

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out the intervention of a jury, by consent of the parties. The court found the issues for plaintiff, and rendered judgment for the amount of his claim and costs of suit.

It is urged that the evidence fails to support the finding of the court below. On the trial, appellee introduced James Larman, who was a defendant, as a witness, and he testified that appellee was employed, by defendants, to go to Colorado to examine mines there. He testifies that he was employed at a meeting of the association, of which defendant was a member; that defendant acted as chairman of the meeting, and that it was agreed the association would give him $50 per week, and pay his expenses while thus engaged; that appellant was at the meeting; that he accompanied appellee to Colorado, and knew that he made the examination; that witness was present at the meeting when appellee made his report; that he was one of the persons who employed appellee.

The evidence shows that appellant was a member of the association, and present at the meeting at which appellee was employed to make the examination. Martin, the secretary, swears he was present, acting as secretary, and corroborates Larman in his testimony as to the employment, and it is shown by the minutes of the meeting, kept by the secretary. And appellee and others testify to his employment. On this question there seems to be no doubt, and he has made out a clear case, unless, for other reasons, he is not entitled to recover.

It is insisted that Mrs. Larman, the wife of James Larman, was a member of the association, and that she should have been a defendant. Larman swears he signed her name to the articles of association, but says it was without authority, as he had never consulted with her on the subject, and that it was not with her knowledge or consent. Even if a married woman could enter into such a contract, so as to be bound by it, there can be no pretense that such an obligation could be imposed by her husband, in the absence of all authority from her for him to make the agreement. And in his statements on this question he stands uncontradicted. It is true, appellant swears that Larman informed him that his wife desired to subscribe for stock. Even if he made the statement it did not prove the authority. He is not shown to have been her agent, so as to bind her, if that could be done by his admissions. There is

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no evidence in the record that Mrs. Larman ever made such an admission, or authorized her husband to make any for her. It then follows that she was properly omitted as a defendant to this action.

It is next urged, that inasmuch as Larman's name was not signed to the articles of association, and as he was not a member, he was not a party to the contract, and that he was not liable, and was an improper party to the suit. If it were conceded that he was not one of the members of the association, it would not follow that he could not become a contracting party with the association, and become jointly bound with them for the performance of an agreement. No reason is perceived why an individual may not unite with a firm, or even a corporation, in making a contract, by which the firm or corporation and the individual would become jointly bound for the performance of the agreement. If the subject-matter of the agreement is legal, and a firm, and an individual, not a member of the partnership, were to enter into an agreement with another person, they could no doubt be sued for the breach of the contract. And no distinction is perceived between such a case and one where a voluntary association, like that proved in this case, and an individual not a member, employing a third person to perform labor or services for them.

In this case Larman acted with and as a member of the association at the meeting, which employed appellee. He was president of the meeting, and was recognized and treated by the members of the association as one of their number. Larman says, "We agreed to pay plaintiff $50 per week and pay his expenses," and this he says was at the meeting over which he presided. This evidence, then, leaves no doubt that Larman did jointly contract, with the other defendants, with the appellee for the services for which suit was brought. Having so contracted, it does not matter whether he was or not a member of the association. We perceive no error in this record and the judgment of the court below is affirmed.

Judgment affirmed.

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BONESTEEL v. BONESTEEL.

(30 Wisconsin, 516. Supreme Court, 1872.)

[1] **Conveyance to married woman without consideration.** One G., at the instigation of the owners, executed a conveyance to the plaintiff of certain "gold claims," belonging (it would seem) to the plaintiff's husband and the defendant; but plaintiff paid no consideration for the conveyance, and it was executed without her knowledge, and never delivered to her; and no mention of any trust was made therein. Afterward she joined with her husband in conveying said "claims" to a third person, and a large part of the proceeds of the sale to such grantee was placed to her credit and drawn out by her on her own checks. She had no knowledge that defendant had any interest in said claims, and probably supposed that they belonged to her husband. *Held*, that she was not liable to defendant as a trustee for him.

[2] **Note to married woman void for want of consideration.** The proceeds of "claims" being in plaintiff's hands, but in fact entirely under her husband's control, defendant received from the husband a part of said proceeds as an advance upon his (defendant's) interest therein. He had no negotiations with plaintiff in regard thereto, and did not know that she claimed the money as a part of her separate estate. *Held*, that the transaction could not be regarded as a loan from plaintiff to him, and that a note subsequently given by him to her for the amount, was void for want of consideration.

Appeal from the Circuit Court for Dodge County.

The case presents two cross-appeals from different parts of one and the same judgment. The plaintiff, Belinda R. Bonesteel, brought her action against the defendant, Jacob P. Bonesteel, upon a promissory note executed by defendant to plaintiff. The answer admitted the making of the note, but alleged that it was without consideration, having been given under threats and to avoid trouble and annoyance. The answer further alleged, by way of counter-claim, that before the making of the promissory note in question, defendant, with one Conklin, was owner of certain gold claims of great value in Colorado, the title to which was in one Gorsline, in trust for defendant and Conklin, and that Gorsline conveyed the claims to the plaintiff in trust for defendant and Conklin, subject to Gorsline's claim for services in negotiating the sale of

[1] *Sawyer* v. *Perry*, 62 Iowa, 238.
[2] *Shaver* v. *Bear River Co.*, 2 M. R. 538.

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the claims; that by the terms of the agreement plaintiff was to sell the claims, and, after settling with Gorsline, to account to defendant and Conklin for the balance of the proceeds received on the sale of said trust estate; that plaintiff afterward sold said claims and trust estate to one McLaughlin, but after settling with Gorsline had withheld from defendant his share of the proceeds, and had neglected and refused to account for the money received by her, out of said trust estate, and had converted the same to her own use. Plaintiff, by her reply, admitted the ownership of the gold claims by defendant and Conklin, the title being held in trust for them by Gorsline, and alleged that her husband had purchased the claims of defendant and Conklin for value, and at the time of such purchase, and before plaintiff conveyed to McLaughlin, it was agreed between her husband and the defendant and Conklin, but without her knowledge and consent, that the conveyance from Gorsline should be taken in the name of plaintiff; that in pursuance of such agreement, Gorsline afterward nominally conveyed the claims to plaintiff but without her knowledge, consent or privity; that she never accepted of any trust in relation to said claims or any of the proceeds thereof under the deed, nor was the deed ever delivered to her, and that she knew nothing thereof until one year afterward, when she joined with her husband in conveying to McLaughlin, and that plaintiff never received any money, either as trustee or otherwise, from any person on account of said claims, but that her husband had had the sole control thereof and had received all the money therefor. The evidence is sufficiently stated in the opinion. The court found as facts: 1st, that the note set forth in the complaint as the foundation of plaintiff's cause of action, was without consideration, and that nothing was due plaintiff thereon; 2d, that plaintiff did not receive the gold claims in trust, and was not liable to account therefor. As conclusions of law the court found: 1st, that plaintiff take nothing by her complaint; 2d, that defendant take nothing by his counter-claim. Judgment for defendant for costs. Defendant excepted to the second finding of fact and second conclusion of law and appealed. Plaintiff excepted to the first finding of fact and first conclusion of law and appealed.

COLEMAN & THORP, for plaintiff.

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GERRIT T. THORN, *contra.*

COLE, J.

These are cross-appeals from different parts of the same judgment.

In respect to the finding and judgment of the court below against the counter-claim set up in the defendant's answer, we think the evidence was insufficient to charge the plaintiff as trustee of those funds. It does not appear that she had any knowledge of the trust, or accepted it. The facts mainly relied on to show that she knew of the trust and accepted it, are these: The trust property was conveyed to her by Judge Gorsline, without any consideration being paid by her therefor. She united with her husband in conveying this same property to McLaughlin. A large portion of the proceeds of the sale of the gold claims was subsequently placed to her credit on the bank books of Mr. Baker, which she drew out on her own checks.

The conveyance by Gorsline was made in the absence of the plaintiff, and without her knowledge, at the instigation of the defendant and the plaintiff's husband. She states in her answer that the deed was never delivered to her, and testifies in her deposition that there was never any property or gold claim conveyed to her by Gorsline in trust for the defendant and Conklin; that she never accepted any such trust—never sold any such claims, nor received any money for them. There is really no evidence to contradict her upon these points. Suppose she had seen the conveyance from Gorsline to her. It is not claimed that this conveyance expressed that the property was conveyed in trust for any one. She states that after the commencement of this suit she was informed that her husband took a conveyance of these gold claims in her name, and she doubtless supposed that they were his property. When she executed the deed to McLaughlin, with her husband, she was of the same impression. She was entirely ignorant of the fact that the defendant had any interest whatever in the gold claims—if such was really the case—and the parties conducting the business seem to have carefully concealed from her, as well as others, the real nature of these transactions.

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Whether this concealment was resorted to for a fraudulent purpose, to place these claims beyond the reach of creditors, we need not inquire. But certain it is that the plaintiff did not know, and had no means of finding out, that these claims had been conveyed to her in trust, and therefore the fact that she united with her husband in conveying them to McLaughlin, is not such an act as ought, under the circumstances, to charge her with the trust. For she doubtless supposed that the claims belonged to her husband, and that the money which was received from the sale of the property was likewise his. In this case, if there was any evidence from which it could be assumed that the plaintiff knew that the property was conveyed to her by Gorsline, in trust, or that the proceeds of the sale belonged to the defendant, there would be some ground for holding her liable in this action as trustee. But there is no such evidence, and nothing whatever to inform her that these moneys belonged to the defendant. We therefore fully agree with the court below in the conclusion that she never received these moneys mentioned in the counter-claim in trust, and is not liable to account therefor.

And we likewise agree with the court below upon the other branch of the case, namely, that the evidence shows that the note sued on was without consideration, and that nothing is due the plaintiff thereon. When the defendant received the thousand dollars from A. D. Bonesteel, in September, 1865, he supposed he was obtaining a portion of his own money in her hands, belonging to him. He seems to have had some interest in the gold claims which were sold. If the proceeds of those claims were in the hands of the plaintiff, they were entirely under the control of her husband. The defendant applied to him for a portion of his money, and as he had every reason to believe, procured it. He had no negotiations with the plaintiff upon the subject, and did not know that she claimed this money as a part of her separate estate. The defendant dealt entirely with his brother, who, he says, looked upon the transaction in the same light that he himself did—that this thousand dollars was an advance from the proceeds of the gold claims. He made no loan of the plaintiff, but treated with her husband as the real responsible party. If A. D. Bonesteel really advanced this thousand dollars to the

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defendant as a portion of the funds under his control belonging to the latter, it is very obvious that the subsequent giving of the note for the amount to plaintiff did not change the nature of the transaction. The note was without consideration.

It follows from these views that those portions of the judgment of the circuit court above respectively appealed from must be affirmed.

By the Court. So ordered.

1. Right of husband to proceeds of oil lands owned by wife during life of wife: *Cady* v. *Gale*, 5 W. Va. 505; Id. 547; *Gale* v. *Oil Run Co.*, 6 W. Va. 200 and 525.

2. Lease ratified after death of lessor, by conduct of his widow: *Trout* v. *McDonald*, 9 M. R. 32.

3. Validity of acknowledgments taken before the husband of a party, or before one of the parties to the instrument: *Tavenner* v. *Barrett*, 21 W. Va. 687, and cases there cited.

4. Notice to husband, not notice to wife, where no agency exists: *Chew* v. *Henrietta Co.*, 4 M. R. 68.

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MEAD v. HAMOND.

(1 Strange, 505. King's Bench, 8 George I.)

Delivery to servant of assayer. Delivery to apprentice is delivery to the master, and trover lies after demand in such case.

The plaintiff, according to the common course of dealing, delivered to the defendant's servant an ingot of gold to assay, and it not being returned he brought trover against the master; and the chief justice directed the jury that the delivery to the servant was sufficient to maintain the action against the master, on proving a subsequent demand and refusal, so the plaintiff had a verdict.

STONE ET AL. v. CARTWRIGHT.

(6 Term (*Durnford & East*) 411. King's Bench, 1795.)

[1] **No action lies against a steward,** manager or agent, for damage done by the negligence of those employed by him in the service of his principal, but only the principal, or those actually employed, are liable.

The declaration stated that the plaintiffs were possessed of a certain close in Tipton, in the county of Stafford, and also of a dwelling house, etc., there; that the defendant was possessed of a certain coal mine under the surface of the said close and house, etc., and that the defendant, well knowing the premises, but contriving, etc., to injure the plaintiff, etc., worked and caused to be worked, etc., his said mine of coal in a negligent, incautious and unskillful manner, and neglected to leave necessary and sufficient pillars, etc., to support the said buildings and premises of the plaintiffs and the soil, etc.; by reason whereof the surface of the said close sunk and gave way, etc. and the buildings, etc., were rent and rendered dangerous. It appeared at the trial before Lord Kenyon, at Stafford, that the colliery belonged to A. M. Ward, an infant, and that the de-

[1] *Stockbridge Co.* v. *Cone Iron Works*, 6 M. R. 317; see *Wright* v. *Compton*, 2 M. R. 189.

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fendant had been appointed agent and manager thereof under the court of chancery; that he employed a bailiff under him, who superintended the work; that he hired and dismissed the colliers at his pleasure, but that he took no personal concern in the business; was not present when the injury complained of was done, nor had given any particular orders for working the mine in the manner which had occasioned it. Upon this evidence Lord Kenyon was of opinion that the action could not be maintained against the defendant, who was the middle man, but that it ought to have been brought either against the person who actually committed the trespass or concurred therein, or against the superior, the owner of the colliery, for whose benefit the work was carried on; and he referred to a case of *Gwinne* v. *Poole*, 2 Lutw. 935. The plaintiffs being nonsuited, Russell now moved to set aside the nonsuit, contending that in tort all were principals and amenable, as well for the acts done by themselves as for those done by their servants or persons acting under their authority. The defendant was the acting manager of the estate, and had the sole power of appointing or dismissing those workmen by whom the injury was committed; he must therefore be considered as the master or owner, at least in respect of strangers. It is not like the common case of a servant acting under his master's directions, who has no discretionary power, but is the mere organ of another's will. The case of *Gwinne* v. *Poole* does not apply, where it was held that trespass would not lie against the officer or judge of an inferior court, out of whose jurisdiction the original cause of action arose, without notice; for the one was bound to act judicially, and the other ministerially; and it was the duty of the defendant in the original action to have availed himself of that defect by showing it at a proper time, and in a proper manner. But here it was the duty of the defendant to take care that those who were employed by him performed their work with due care and circumspection.

LORD KENYON, Ch. J.—There is no pretense whatever for imputing liability to the defendant in this action; it might as well be contended that a similar action would lie against the steward of another for all the defaults of improper conduct of the men employed under him, by which any other person received damage. In all these cases I have ever understood that the ac-

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tion must either be brought against the hand committing the injury, or against the owner for whom the act was done; but it was never heard of that a servant who hires laborers for his master was answerable for all their acts. The present defendant has no interest in the colliery, nor was it worked for his benefit; he was no more than a steward appointed by the court of chancery. His lordship mentioned the case of *Gwinne* v. *Poole*, 2 Lutw. 935, and *Goodwin* v. *Gibbons*, 4 Burr, 2108, where this question has been considered.

ASHHURST, J., declared himself of the same opinion.

GROSE, J.—It frequently happens that a person's gardner employs laborers under him, yet it could never be contended that on that account he would be answerable for damage done by them in the course of their employment.

LAWRENCE, J.—If the plaintiffs had given evidence that the defendant had particularly ordered those acts to be done from whence the damage had ensued, that would have varied the case; but no such evidence being adduced, I think the opinion delivered at the trial was perfectly right.

Rule refused.

ASHWORTH v. STANWIX ET AL.

(3 Ellis & Ellis, 701. Queen's Bench, 1860.)

Master liable where he becomes a workman. The principle that a servant sustaining an injury from the negligence of a fellow servant, while engaged in the common employment, can not recover in an action against the common master, does not exempt from liability a master who himself takes part in the servant's work, and while so doing injures the servant through negligence.

[1] **One partner liable, all liable.** If the master is a member of a partnership by whom the servant is employed, and the work in which he so takes part is within the scope of the common undertaking of the partnership, his copartners are jointly liable with him for the injury thus caused to the servant by his negligence.

Declaration: That defendants were possessed of a certain coal pit, wherein there was a shaft, and that plaintiff was law-

[1] *Douty* v. *Bird*, 60 Pa. St. 48; *Post* TRESPASS.

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fully employed in the said pit at the bottom of the said shaft, and in which said pit a certain corf was used by defendants for the purpose of raising coal from the said pit to the mouth of the said shaft; yet defendants so negligently guarded the mouth of the said shaft, and so carelessly used and managed the said corf, and took so little care of a certain plate or rail of defendants at the mouth of the said shaft, that by reason of the carelessness, etc., of defendants, the said plate or rail fell down the said shaft and struck plaintiff on the head with great force and violence, and fractured his skull, whereby plaintiff became, was and is permanently injured, etc.

Pleas. 1. Not guilty. 2. Not possessed. Issue thereon.

At the trial before BLACKBURN, J., at the Durham Spring Assizes, 1860, it appeared that the two defendants were lessees of a coal pit, and were, in that respect, in partnership together. The plaintiff was a pitman employed in the pit by them. On the day when the accident happened he was so employed, and the defendant Walker was acting as banksman at the mouth of the shaft. For the purpose of emptying the corves as they came up full of coal from the pit there was a short tramway made of the usual rails or plates. The banksman's duty was to receive the full corf as it came up, to place it on a tram which traveled upon the tramway, and to hook on the corf which was to go down empty. There was evidence that one of the tramplates was loose, and it appeared that while the defendant Walker was acting as banksman, and after he had been told of the insecure state of this tramplate, it fell down the pit and caused severe injury to the plaintiff, who was standing at the bottom of the shaft. The defendant Walker was clearly guilty of negligence, but it was not shown that Stanwix, who was absent at the time of the accident, knew that the tramplate was loose.

The jury found a verdict for the plaintiff as against Walker, and by the direction of the learned judge a verdict for the defendant Stanwix; leave being reserved to the plaintiff to move to enter a verdict against both defendants.

Manisty had obtained a rule calling on the defendant Stanwix to show cause why a verdict should not be entered for the plaintiff against both the defendants, on the ground that there was evidence to go to the jury upon which they might

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reasonably have found a verdict for the plaintiff against Stanwix as well as against Walker.

OVEREND showed cause.

MANISTY and DAVISON, *contra.*

CROMPTON, J., now delivered the judgment of the court.

The question to be determined in this case is, whether the defendant Stanwix, being co-proprietor with the other defendant, Walker, of a mine, is jointly liable with him for an injury sustained by the plaintiff, a workman in their common employ, through the negligence of the defendant Walker. The facts are such that if the defendant Walker had been simply the fellow workman of the plaintiff the case would have come within the principle that a servant, sustaining injury from the negligence of a fellow servant engaged in the same employment, can not recover against the common master. The present case would then have been quite analogous to that of *Bartonshill Coal Co.* v. *Reid*, 3 Macq. Sc. App. Ca. 266. But the present case is distinguishable from the class of cases which have been referred to, in the important particular that the defendant Walker, although, in fact, engaged jointly with the plaintiff in the work of the mine, was also a co-proprietor, and, as such, one of the plaintiff's masters; and the question is, whether this circumstance takes the case out of the before mentioned rule, and calls for the application of a different principle. We are of opinion that it does, and that the plaintiff is entitled to hold the defendant Stanwix responsible for the negligence of his co-proprietor and partner. The doctrine that a servant on entering the service of an employer takes on himself, as a risk incidental to the service, the chance of injury arising from the negligence of fellow servants engaged in the common employment has no application in the case of the negligence of an employer. Though the chance of injury from the negligence of fellow servants may be supposed to enter into the calculation of a servant in undertaking the service, it would be too much to say that the risk of danger from the negligence of a master, when engaged with him in their common work, enters

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in like manner into his speculation. From a master he is entitled to expect the care and attention which the superior position and presumable sense of duty of the latter ought to command. The relation of master and servant does not the less subsist because, by some arrangement between the joint masters, one of them takes on himself the functions of a workman. It is a fallacy to suppose that on that account the character of master is converted into that of a fellow laborer. Though engaged with the plaintiff in a common employment, Walker did not the less remain the master of the plaintiff and the partner of the defendant Stanwix. This being so, it follows that Stanwix must be liable in respect of the negligence through which injury has arisen to the plaintiff, as the relation of partner subsisted between Walker and Stanwix, and as the negligence was a matter within the scope of a common undertaking, we think that Stanwix is equally liable with Walker. That a partner is liable for the negligence of his copartner when engaged in the business of the partnership, is not only clear in principle, but is established by the case of *Moreton* v. *Hardern*, 4 B. & C. 223, in this court, where two proprietors of a stage coach were held liable with a third for the negligence of the latter, by whom the coach had been driven. Now it has never been doubted that for personal negligence of the master, whereby injury is occasioned to the master, the master will be liable. Personal negligence is clearly established against Walker, and it being admitted that the defendant Stanwix was his co-proprietor and partner, the latter must be held to be jointly responsible in respect of such negligence, and is therefore liable in this action. The rule must be made absolute to enter the verdict against him as well as the other defendant.

Rule absolute.

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MELLORS v. SHAW AND UNWIN.

(1 Best & Smith, 437. Queen's Bench, 1861.)

[1]**Negligence of owner acting as manager—Injury from falling scale.** Declaration stated that defendants were owners of a coal mine, and plaintiff was employed by defendants as a collier; that in the course of his employment it was necessary for him to descend and ascend through a shaft constructed by defendants; that by the negligence of defendants the shaft was constructed unsafely, and was, by reason of not being sufficiently lined or cased, in an unsafe condition, which defendants well knew; and by reason of the premises, and also by reason, as defendants well knew, of no sufficient or proper apparatus having been provided by defendants to protect plaintiff from injuries arising from the unsafe state of the shaft, a stone fell from the side of the shaft on the head of the plaintiff, and he was dangerously wounded. Plea, not guilty. At the trial it was proved that S., one of the two defendants, was manager of the mine, and that it was worked under his personal superintendence, and that the plaintiff was not aware of the state of the shaft. The jury found that the defendants were guilty of personal negligence: *Held*,

1. On motion to enter a nonsuit that on this finding of the jury S. was liable, and therefore the other defendant was liable also.

2. On motion in arrest of judgment that the declaration must be taken to allege personal knowledge in the defendants of the state of the shaft, and therefore the action was maintainable.

Scintilla of evidence. The doctrine that if there is only a scintilla of evidence for the jury, the verdict of the jury is not to be disturbed, is now exploded.

The declaration stated that the defendants, at the time of the committing of the grievances thereinafter mentioned, were the owners of a certain coal mine, and the plaintiff was employed by the defendants as a collier, to do certain work for the defendants in the said mine, and in the course of his employment it was necessary for him to descend into the said mine, and ascend therefrom, through a certain shaft of the said mine, also constructed by the defendants. It then alleged that by the negligence and fault of the defendants the shaft was constructed unsafely, and in a defective and improper manner, and was, by reason of not being sufficiently lined or cased, in an unsafe and unfit condition for being used for the purpose aforesaid, which the defendants well knew; and by rea-

[1] *Hall* v. *Johnson*, 9 M. R. 684.

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son of the premises, and also by reason, as the defendants well knew, of no sufficient or proper apparatus having been provided by the defendants to protect the plaintiff while so employed by them in the mine as aforesaid from injuries arising from the unsafe state of the shaft, while the plaintiff was in the course of his employment ascending the shaft, a large stone fell from the side of the shaft on the head of the plaintiff, and thereby the plaintiff was dangerously wounded, etc.

Plea, not guilty.

On the trial before KEATING, J., at the Lent Assizes for Yorkshire in 1861, it appeared that the plaintiff, at the time of the accident, was a pitman in the employment of the defendants, who were owners of a colliery at Brightside, near Sheffield. The defendant Shaw was the manager of the colliery, and it was worked under his personal superintendence; the shaft in which the injury was received by the plaintiff had been sunk about six years, and, until June, 1859, it had been used as an air shaft, with fire at the bottom, for causing a draught upward; it was then converted into, and at the time of the accident in May, 1860, was used as a drawing shaft. It passed through several strata, one of which was argillaceous stone, called "bind." The "bind," under the action of the air and heat when the shaft was used as an air shaft, would be subject to crumble and fall, and when it was converted into a drawing shaft it would have been safer to have cased or lined it throughout. In fact only a portion of the shaft at the top, and another portion at the bottom, were cased or lined. In order to protect the men from anything falling from the sides of the shaft, while ascending or descending, it had become a common precaution to put metal coverings, called "bonnets," over the cages in which the men were let down or drawn up. Two "bonnets" had been provided by the defendants, but neither of them was over the cage in which the plaintiff was being drawn up at the time he received the injury. The plaintiff had been in the employment of the defendants about three years ago; he then left, and returned to them about a fortnight before the accident. He did not know that the shaft was not cased or lined all the way. Evidence was given for the defendants to show that they exercised the same ordinary care and vigilance as was used in collieries in the neigh-

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borhood to keep the shafts safe; that the shaft had been safely used for six years before the accident and without remonstrance or notice to them that it was dangerous. Upon the evidence it was doubtful whether the injury to the plaintiff was caused by the falling of "bind" from the sides of the shaft, or by the plaintiff's head striking one of the stays in the shaft. Independently of this question of fact, it was contended, on behalf of the defendants, that there was no evidence that the defendants knew that the shaft was not in a condition fit to be used, nor any evidence of personal negligence on their part. The learned judge having declined to nonsuit, the jury found that the defendants were guilty of personal negligence both as to the state of the shaft and as to the cage not being covered with a bonnet, and gave a verdict for the plaintiff for £150. Leave was reserved to the plaintiff to move to enter a nonsuit if the court should be of the opinion that there was no evidence to go to the jury.

In the following Easter Term,

MONK obtained a rule to show cause accordingly, or in arrest of judgment, on the ground that the declaration did not show any cause of action.

MANISTY and QUAIN, showed cause.

T. JONES, *contra*.

CROMPTON, J.

After the decision of this court in *Ashworth* v. *Stanwix*, 3 E. & E. 701, which I think was a right decision, we must hold that if the defendant Shaw is liable for personal negligence, his partner, the other defendant, is liable also.

The first question, then, in the case is, whether there was evidence to go to the jury of negligence against the defendant Shaw. I should have arrived at a different conclusion from that to which the jury came upon the evidence before them, but there could be a fresh inquiry only on payment of costs, which the defendants, acting, I doubt not, wisely, have declined to ask for. The doctrine that if there was only a scintilla of evidence for the jury the verdict is not to be disturbed,

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has been exploded, but we must not, on that account, promulgate the notion that though there was substantial evidence to be left to the jury, we will send a case down again and again; otherwise we may do away with trial by jury altogether. It would be going too far to say that there was no case for the jury on this evidence, though I am not satisfied that the verdict was right. [His lordship commented on the evidence.]

Then it is said that the case falls within the principle of *Priestley* v. *Fowler*, 3 M. & W. 1, and that class of cases in which an action against the master has been held not maintainable. I have thought that case rather inconsistent with the later cases on the subject; but considering what was said by my brothers in those cases, and seeing as my brother Blackburn has pointed out, that the declaration in *Priestley* v. *Fowler* contained no allegation that the defendant knew the defects in the van in which the plaintiff was placed, I conceive that the rule laid down in that case, that a servant on entering the service of an employer takes upon himself the risks of the service, does not apply where there has been personal negligence in the master which causes the injury to the servant. This court said so in *Ashworth* v. *Stanwix*, 3 E. & E. 701; and in *Roberts* v. *Smith*, 2 H. & N. 213, 218, in the Exchequer Chamber, the rule for a new trial was made absolute, upon the ground that there appeared to have been evidence of "the personal interference and negligence of the master. In *Tarrant* v. *Webb*, 18 C. B. 797, the judges said that want of care in the selection of competent servants would be one instance of negligence. The same law is laid down in *Ormond* v. *Holland*, E., B. & E. 102; where the master did not personally interfere, and therefore he was not liable—I said, p. 106, "I think that the rule of law laid down by Mr. Hill is accurate, namely, that the master is not liable unless there be personal negligence on his part, which negligence may be either in personally interfering in the work, or in selecting the servants who do interfere." Mr Jones contends that to render the master liable there must be actual, personal interference on his part, so as to lay a trap for the servant in the particular matter from which he received the injury. I do not agree to that; I think it is negligence for which the master is

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liable, if he knows that the machinery or tackle to be used by the persons employed by him is improper or unsafe, and notwithstanding that knowledge sanctions its use, as in *Roberts* v. *Smith*, 2 H. & N., 218; though there may be a doubt as to his liability where the servant is aware of the defective state of the machinery, and so may be presumed to have taken upon himsalf the extra risk for the sake of extra wages. *Dynen* v. *Leach*, 26 L. J., N. S., Ex. 221, is the case most in favor of Mr. Jones' argument; but that was decided before the recent cases on the subject, and in that case the workman did the act which directly caused his death, and he knowingly used a dangerous machine. In this case the evidence of the plaintiff was, that he did not know that the shaft was not lined throughout. The principle in *Priestley* v. *Fowler*, 3 M. & W. 1, is subject to the exception involved in the case which Lord Abinger said, p. 5, the court was not called upon to decide; if there is personal negligence in the master he is liable, and if he knows the defects which cause the injury, that is evidence of personal negligence. In this case there is some evidence of such knowledge, and therefore this action is maintainable.

This disposes of the other part of the rule for arresting the judgment, because if the declaration is defective in form, it might be cured by amendment. The rule, therefore, must be discharged.

BLACKBURN, J.—I am of the same opinion. The verdict appears to me not to be satisfactory; but there was, in the plaintiff's case, enough evidence of the cause of action to go to the jury, and that was uncontradicted by the evidence for the defendants. There was certainly some evidence from which the jury might reasonably draw the conclusion that the injury was caused by the "bind" falling upon the plaintiff, and the sides of the shaft were in such a state as to be some evidence of negligence in the defendant Shaw in keeping it unlined. Then, Shaw, one of the defendants, being engaged in working the mine (*Ashworth* v. *Stanwix*), establishes that if he is liable as master, the other defendant is liable as master also. We can not, therefore, make the rule absolute to enter a nonsuit.

The question, therefore, is whether the defendant Shaw is liable. In *Priestley* v. *Fowler*, 3 M. & W. 1, the objection, as stated by Lord Abinger, p. 5, was "that from the mere re-

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lation of master and servant, no contract, and therefore no duty, could be implied on the part of the master to cause the servant to be safely and securely carried, or to make the master liable for damage to the servant, arising from any vice or imperfection unknown to the master, in the carriage, or in the mode of loading or conducting it." The ground of the decision is that there was no warranty on the part of the master that the carriage should be free from defects or that no injury should happen to his servant. Much reasoning follows in Lord Abinger's judgment, which introduced a new branch of law, viz., that the master is not liable to his servant for the misconduct or negligence of others who serve him. *Roberts* v. *Smith*, 2 H. & N. 213, in the Exchequer Chamber, however, establishes that where the injury has been caused by the personal interference or negligence of the master, the servant may maintain an action against his master. There is this exception, that the right of action against the master does not extend to a case where the negligence of a fellow servant causes the injury; the master is not identified with the servant for the purpose of making him liable for the servant's negligence. There is probably another exception where the master has furnished instruments or machinery which are dangerous, but the servant knows that they are dangerous, and the danger is so normal that it is in the ordinary course of the employment; in that case the servant can not complain of an injury which he has sustained, because he undertook the employment with that risk. *Dynen* v. *Leach* may be supported on that ground. In that case there was nothing to show that the master knew, and that the servant did not know, the dangerous state of the machine; therefore the plaintiff was in the position of a servant taking the employment with the accompanying risk, induced to do so by high wages. In this case there was such evidence, and therefore the ground of nonliability does not apply.

The question on the rule for arresting the judgment is the same as that we have been discussing; the declaration must be understood to allege that, by the personal negligence of the defendants, the shaft was in an unsafe state, and that the defendants had personal knowledge of that unsafe state, which make the cause of action.

Rule discharged.

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HALL, an Infant, by his Next Friend, v. JOHNSON ET AL.

(3 Hurlstone & Coltman, 589; 34 L. J. Ex. 222. Exchequer Chamber, 1865.)

[1] **Scale—Negligence of underlooker.** The plaintiff, a workman in a coal mine of the defendants, received damage from the fall of a scale from the roof which had lost its support by reason of the removal of the coal below in the ordinary course of working. The defendants' underlooker, whose duty it was to superintend the mining operations, had negligently, though the danger had been pointed out to him, omitted to prop up the roof. The removal of the coal and the propping up of the roof ought, in the exercise of due care, to be nearly contemporaneous operations: *Held*, that as there was no evidence that the defendants had not exercised due care in the selection of their underlooker, nor in putting the mine into a proper condition before the miners were sent into it, they were not answerable for the injury caused to the plaintiff by the negligence of the underlooker, his fellow laborer.

Appeal from the Court of Exchequer.

Error on a bill of exceptions.

The action was for an injury to the plaintiff; the declaration alleged that the defendants did not use reasonable care in preventing the roof of their mine falling in on the plaintiff, their servant.

The defendants were owners of a coal mine. The plaintiff was a boy in their employment and worked in their mine, which had been opened and in regular work for five or six years. The nature of the mine required that as the coal was removed in the course of working, the roof of the mine should be propped up to prevent it falling in. The defendants did not personally superintend the working of the mine, but left it to a superior workman called an underlooker, whose duty it was to see to the proper propping up of the roof. The plaintiff, observing a stone in the roof of the mine likely to fall, pointed it out to the underlooker. The latter, however, told the plaintiff to go on with his work, and took no steps to secure the stone in the roof. On the following day as the plaintiff was engaged in his work the stone fell on him and seriously injured him. Blackburn, J., ruled that there was no

[1] *Quincy C. Co.* v. *Hood*, 12 M. R. —; *Collier* v. *Steinhart*, 10 M. R. 1.

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evidence for the jury to support the plaintiff's claim against the defendants, no evidence having been given of any personal interference on the part of the defendants, or any knowledge by them of the state of the mine.

To this ruling the bill of exceptions was tendered.

T. JONES, for the plaintiff (Feb. 7).—The ruling of the learned judge was wrong. There was evidence for the jury that the defendants were liable in law for the injury to the plaintiff. The defendants carry on a dangerous business, and engage persons to work in it. There is an inalienable duty cast by the law on persons carrying on dangerous works, to take care that everything should be done to prevent extraordinary damage. It is clear that this injury was caused by the negligence of the underlooker, but the defendants can not relieve themselves from liability by casting the duty of keeping the mine in safety on him. It may be conceded as a general rule that a master who takes due and reasonable care in selecting proper servants, is not liable for an injury that those servants, by their negligence, inflict on other fellow servants; but if the occupation is hazardous, besides using reasonable care in selecting his workmen, he is under the further obligation of seeing that the place where the men work is in a reasonably safe and sound condition: *Patterson* v. *Wallace*, 1 Macq. 748; *Bryden* v. *Stewart*, 2 Macq. 930.

(ERLE, C. J.—There the master started the mine with an unsafe shaft.)

In *The Bartonshill Co.* v. *Reid*, 3 Macq. 267, 286, the owner of the mine was held liable to one of his workmen for an injury caused by the fall of the roof of the mine.

(CROMPTON, J.—How do you make it negligence in the master if he does not know of the state of the roof?)

He is bound to inform himself of it. The negligence of the underlooker is, in a case like the present, the negligence of the master. If the defendants' liability as masters be limited to taking reasonable and proper care to keep the roof of their mine in a reasonable and proper condition, there is evidence of the defendants' liability here, for they did not take such proper care. The liabilities for injuries from the risks of the service are very different, and in the cases are carefully distinguished

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from the liabilities attaching on the master from risks arising out of the condition of the plant, machinery or mine: *Clarke* v. *Holmes*, 7 Hurl. & N. 937.

E. JAMES (CROMPTON HUTTON with him), for the defendants was not called upon.

Cur. adv. vult.

The judgment of the court was now (Feb. 8th) delivered by ERLE, C. J.

In this case the plaintiff was a laborer in a mine, and he received damage by the fall of a stone from the roof of that mine. The evidence clearly is that the underlooker employed by the defendants in that mine was guilty of negligence in not propping up the roof of the mine, and that the damage to the plaintiff was caused entirely by that negligence of the underlooker. The question for us is whether under these circumstances the defendants are answerable for the negligence of the underlooker.

There is no evidence at all to show that the defendants had been guilty of any want of proper care in the selection of the underlooker, nor of any want of due care in respect of putting the mine into proper order for mining operations before the miners were sent down into it; on the contrary, it appears by the evidence that the mine had been worked in the ordinary course of proper mining for the last five or six years. In the course of the mining operations of taking the coal from the bed, the coal roof would be continually in a state requiring props; for as the coal was withdrawn below, so was it needed that the roof should be propped above from time to time. Those two operations would be going on contemporaneously. The injury to the plaintiff was caused by the underlooker delaying for one day to prop the roof where the coal had been withdrawn. The plaintiff had given him full notice that a prop to the roof was wanted. The underlooker therefore clearly was guilty of negligence. Upon these facts we think that the position is not tenable; that the defendant, the owner of the mine, is responsible for the negligence of the underlooker. We have come to the conclusion that the underlooker, who had to see to the

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mining operations in this part of the mine, and the plaintiff, were fellow laborers. We take the principle to be established from a series of decisions in this empire and in America (decisions collected with great skill and clearness by Mr. Manley Smith in his book on Master and Servant), that where a laborer is damaged by the negligence of a fellow laborer, the master is not responsible. Whether it can properly be predicted that two persons stand in the relation of fellow laborers, is at all times a question of difficulty. My brother Williams brought the idea into prominent relief by saying that sometimes a person called a fellow laborer should rather be considered to stand in the position of a deputy master; and if an act of negligence causing injury to a workman was clearly brought home to one in the position of deputy master, it might be a question whether the real master was not responsible for his negligence. We wish to reserve our opinion in respect of that question whenever the facts of the case shall give rise to it. On the present occasion we consider it to be past all doubt that the underlooker and the plaintiff were fellow laborers, and we can not look on the underlooker as in the position of a deputy master whose negligence had made his principal responsible. On these grounds we think that the nonsuit by my brother Blackburn was right, and that the judgment of the court below must be affirmed.

The other judges concurred.

Judgment affirmed.

PERRY v. RICKETTS.

(55 Illinois, 234. Supreme Court, 1870.)

Injury to servant through negligence of master—Spliced rope. An employe in a coal mine, while descending the shaft in a cage, was precipitated to the bottom, a distance of thirty-five or forty feet, by the breaking of the rope by which the cage was let down, and was seriously injured. Several months prior to the injury, the rope being old and in bad condition was spliced, and a few weeks before the accident was again spliced. The employer was at that time informed that the rope was unsafe. The injured man had been employed at the mine only

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about twenty days when the accident occurred; and one witness testified that he told him he would be injured if he worked in the mine. The condition of the rope could not be seen by ordinary observation. *Held*, that the use of the rope in its unsafe condition was gross negligence in the employer, and that he must answer in damages for the consequences.

[1] **Idem—Notice of defect by employe, when not required.** It was not incumbent on the employe, under the circumstances, to notify his employer of the defect, which the former had but slight opportunity of knowing, and notice of which had already been given to the latter.

Appeal from the Circuit Court of Woodford County; the Hon. S. L. RICHMOND, Judge, presiding.

CLARK & BAKER, and BURNS, for appellant.

GEORGE H. KETTELLE, for appellee.

THORNTON, J., delivered the opinion of the court.

Appellant owned and operated a coal mine. For egress and ingress a rope was fastened to the cage, and thence run over pullies and attached to the engine. Appellee was employed as a miner, and in descending into the shaft the rope broke and precipitated him thirty-five or forty feet, by means whereof he was seriously injured. This suit was brought to recover for such injury, and a verdict obtained for $587.33, and judgment rendered thereon. For a reversal the case is brought to this court.

The rope was evidently defective, the injury sufficiently serious to justify the verdict rendered, and hence the case is narrowed to the discussion of a knowledge of the defect by the parties, and their comparative negligence.

The injury happened on the fifteenth of October, 1869. It was proved that in the previous spring the rope was old and in bad condition, and was then spliced; that it was again spliced in August and September, 1869; that appellant was then informed it was unsafe; and that its condition could not be seen by ordinary observation. One witness also stated that he told appellee he would be injured if he worked in this mine. Such is substantially the evidence, though it is conflicting.

Appellant furnished the necessary machinery to operate the

[1] *Knaresborough* v. *Belcher Co.*, 12 M. R. —.

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mine, and a competent engineer. The only complaint is of the defective rope. Appellant was his own superintendent, and provided whatever was needed about the business.

Under these circumstances we are asked to apply to this case the rule that one servant can not recover against the common master for injuries resulting from the negligence of a fellow servant, if proper precaution had been observed in their selection. Such application can not be made. There is no proof of carelessness on the part of the engineer. He may have been, and probably was, wholly ignorant of the defective character of the rope. The master, on the contrary, was fully informed, and permitted this insecure rope to be used, thus endangering the limbs and lives of his employes. It was his duty, and not that of the engineer, to furnish safe materials. This was his direct undertaking with his servants. The injury was the result of the fault of the master, and not of the negligence of a fellow servant.

It is also urged that the injury was occasioned by negligence of appellee; that he should have given information of the condition of the rope, and thus have prevented the accident. He could not have known much about it, as he had been in the employ of appellant for less than twenty days, and the proof shows that the defects could not have been detected by ordinary observation. Neither is it probable that he would hazard life and limb by a descent into a shaft of the depth of one hundred and fifty feet, with nothing to protect him from serious injury, if not death, save an old, and almost rotten, rope. Besides, the evidence is that appellant had full information from others, that the rope was unsafe. He knew that it was old, badly worn and had been spliced three times. The use of it, under such circumstances, was gross negligence, from which he should not be relieved on account of any slight carelessness on the part of the appellee.

The case is a plain one from the evidence, and properly decided. It is therefore unnecessary to discuss the instructions. The judgment is affirmed.

Judgment affirmed.

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ISAACS, Respondent, v. MCANDREW ET AL., Appellants.

(1 Montana, 437. Supreme Court, 1872.)

Entire contract. Full performance of a contract, entire in its nature, is a condition precedent to the right to recover for services thereunder.

Remedies for breach of entire contract. If a party is prevented from performing a contract, entire in its nature, by the action of the other party, he has the choice of three remedies: *First*, he may keep himself ready to perform until the contract, by its terms, expires, and then bring suit on the contract itself; *second*, he may bring suit upon the *quantum meruit* for what his services are actually worth; *third*, he may sue for damages for breach of the contract.

[1] **Contract for services—Time of payment.** A written contract for five years' services as superintendent of mines, at the rate of $4,000 per year, to be paid as part of the business expenses of the enterprise, in which no time of payment is fixed, is an entire contract, and performance of the work for the whole period is a condition precedent to the right to sue for the hire.

Contract for superintendent's expenses construed. An agreement that the traveling and living expenses of the superintendent of a mine shall be a charge upon the business and property of the enterprise, creates no right on the part of the superintendent to proceed against his employers before an attempt is made to exhaust the remedy against the property itself.

Interest on money expended by superintendent. A claim of interest on money laid out and expended by the superintendent of mines will only be allowed under the Montana statutes when it is averred and proved that there has been unreasonable and vexatious delay.

Quitting before expiration of year. The finding of a jury that a party has performed services as superintendent of mines in Montana for a year, under contract, will be set aside if the evidence shows that he left the Territory before the year expired.

Lex loci—Place of demand—Rate of interest. Under a contract, made in New York, for services to be rendered in Montana, a demand of payment should be made at the domicile of the employer; but if payment is delayed or refused, interest should be reckoned according to the law of the place where the contract is performed.

Contract between husband and wife. A contract, in which a husband agrees to perform services for his wife and two other persons, and a judgment obtained thereon, are both void at common law as between husband and wife; and if such a contract is authorized by statute, the strict letter of the statute must be followed.

[1] Compare *Franklin M. Co.* v. *Harris*, 24 Mich. 115; *K. P. R. Co.* v. *Roberson*, 3 Colo. 142.

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Motion to withdraw counter-claim. When the record shows that after the testimony had closed, and before the court had finished charging the jury, the defendants moved for leave to withdraw their counter-claim, which motion was overruled, such ruling will not be disturbed unless manifest injustice is done thereby.

Appeal from the First District, Madison County.

This action was tried in November, 1869, by a jury, who returned a general verdict for Isaacs, on which the court, WARREN, J., rendered judgment.

Isaacs was restrained by an order of the court, in a suit in which McAndrew and another were the plaintiffs, from acting as superintendent of mines under the contract set forth in the opinion, from January 7, 1868, to September, 1868. It appeared from the evidence that the contract had never been dissolved or canceled by the parties; and that Isaacs testified that he notified McAndrew in New York City, in April, 1868, that he had come there to make a settlement with appellants, at the request of their agent in Montana, and that McAndrew then said that no person had any authority to so notify him to appear.

The other facts appear in the opinion.

W. F. SANDERS, for appellants.

G. G. SYMES, S. WORD and H. N. BLAKE, for respondent.

WADE, C. J.

This is an appeal from the judgment of the court below, and from the order overruling the motion for a new trial, and whatever appears in the bill of exceptions, taken at the trial and allowed by the court, is properly before us for consideration and decision. The suit is for services alleged to have been performed by plaintiff for defendants, in pursuance of the terms of a written contract between the parties, and the complaint substantially alleges: That in the months of February and March, 1867, the plaintiff was employed by defendants at their special instance and request as general manager of the mining business and property of the defendants in Montana Territory, for the period of five years from the 2d day of February, 1867, unless the agreement entered into between

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the plaintiff and defendants should be sooner dissolved or canceled; that on the 9th day of March, 1867, defendants proposed to pay plaintiff for his services at the rate of $4,000 per year, in Montana currency, allowing greenbacks to be worth 90 cents of the dollar, commencing on the 1st day of April, 1867, which agreement and proposition were made in the city of New York, and accepted and ratified by said plaintiff at the times the same were made; that the plaintiff, being employed as aforesaid, took charge of the mining business and property of said defendants in said Territory, as general manager thereof, in the month of March, 1867, and that he continued to perform the service of such general manager from that date until the 1st of April, 1868, without any fault or omission of duty on his part; that said agreement has never been dissolved or canceled; that the same was in full force and effect from the time the same was made until the 1st day of April, 1868; that the value of said $4,000 in Montana currency was $4,444.44, and that plaintiff was entitled to receive that sum for his services aforesaid, and that no part thereof has been paid, although the same was demanded of defendants in the city of New York, in the month of April, 1868.

The second cause of action charges defendants with the sum of $1,100, for so much money paid, laid out and expended for said defendants by said plaintiff, and to and for the use and benefit of defendants, and at their special instance and request, in defraying the expense of plaintiff and his wife in getting from the city of New York to said Territory.

The third cause of action charges defendants with the sum of $600 for so much money paid, laid out and expended by said plaintiff for said defendants, at their special instance and request, in defraying the living expenses of the plaintiff in said Territory.

The fourth cause of action charges defendants with the sum of $1,000 for money paid, laid out and expended by plaintiff for said defendants, at their special instance and request, in defraying the expense of plaintiff in going from this Territory to the city of New York, and returning therefrom to said Territory.

The answer of the defendants denies that the plaintiff, in the months of February and March, 1867, or at any other time,

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was employed by the defendants as general manager of the mining business and property of the defendants in the Territory of Montana, for the period of five years, or for any other period than from the 1st day of April, 1867, to the 6th day of January, 1868; and deny that plaintiff continued to perform such services, or any service for defendants, after said 6th day of January, 1868; deny that plaintiff complied in all respects with contract, without any fault or omission of duty on his part; but, on the contrary, allege that plaintiff, when he entered upon their employment, as aforesaid, in consideration of the sum agreed to be paid to him for said services, undertook and agreed that he was competent to discharge the duties of general manager and superintendent of the mining business and property of defendants in said Territory; that he would devote his entire time and energies in the discharge of such duties; obey all instructions he should receive from defendants in reference to said business; make full reports from time to time to the defendants of all matters affecting their interests in and about said business; not deceive the defendants with reference to any of said business or property. But alleges that said plaintiff, while so employed as aforesaid, was not competent to discharge the duties of said general manager or superintendent of said mining business and property; did not devote his entire time or energies to the discharge of the duties aforesaid; did not obey the instructions of the defendants with reference to their business; did not make full, nor truthful, reports of said business to said defendants; deceived defendants with reference to their said business and property; was extravagant in the expenditure of defendants' money; insubordinate to their instructions; made to them false reports in and about their said business; bought other mining property in said Territory with defendants' money without their authority; and would not, and did not, comply with said contract of service. Wherefore, the defendants, on the 6th day of January, 1868, discharged plaintiff from said service and employment; and defendants aver payment of $3,000 to plaintiff on account of his services, between the 1st day of April, 1867, to January 1, 1868.

The answer to the second, third and fourth causes of action is a general denial, and in further answering the defendants set up a counter-claim against the plaintiff, for goods sold and

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delivered to plaintiff at his special instance and request, and for money had and received of defendants, and for money paid, laid out and expended by defendants for plaintiff at his instance and request, and demanding judgment for amount of counter-claim.

The reply of plaintiff denies that he undertook or agreed with defendants that he was competent to discharge the duties of general manager or superintendent as aforesaid; denies that he agreed to obey all instructions of defendants in reference to said business, and denies that he agreed that he would not deceive defendants about said business and property. Said replication also denies that defendants have paid him $3,000, or any other sum, on account of said service, denies that he was ever discharged from said service, denies counter-claim and all the averments thereof, and alleges faithful performance of his duties under said contract.

The plaintiff, to maintain the issues on his part, introduced and read in evidence the following contract:

"*CONTRACT.*"

"This agreement made this second day of February, in the year one thousand eight hundred and sixty-seven, between Alexander McAndrew and Samuel Wann, both of the town of Middletown, in the county of Richmond and State of New York, parties of the first part, and Maria Josephine Isaacs, wife of James P. Isaacs, of Montana Territory, party of the second part, and said James P. Isaacs, party of the third part.

"Whereas, the parties hereto of the first and second parts are jointly interested in certain mining property, mill machinery and other property, particularly described in a certain deed thereof bearing date the first day of February, one thousand eight hundred and sixty-seven, made by said parties of the first part to said party of the second part, in the proportion of three quarters owned by said parties of the first part and one quarter owned by said party of the second part; and,

"Whereas, the parties of the first part have advanced all the moneys so far expended in purchasing said property, and in the expenses attendant upon and connected therewith, and are to advance such further sums as may be needed in the developing and working of said property; and,

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"Whereas, it is desired and intended that said property shall be managed and worked for the joint account as one property, and that the party of the third part shall be employed as general manager and superintendent of the same in Montana Territory:

"Now, therefore, this agreement witnesseth: That the parties hereto, in consideration of the premises and of the mutual covenants and agreements herein contained, have mutually agreed and covenanted, and by these presents do mutually agree and covenant, each with the other, as follows:

"*First.* That the said entire property, mines, mining interests, mill, machinery, and other property of the said parties of the first and second parts, shall be controlled and managed by said parties of the first part, but for their joint account and upon the terms and in the manner hereafter provided for, and to that end the said party of the second part hath made, constituted and appointed, and by these presents doth make, constitute and appoint the said parties of the first part her true and lawful attorneys, irrevocable during the continuance of this agreement, for her and in her name, place and stead, to take charge of, manage and control her interest in the property aforesaid and for her and in her name, in their discretion to sell such portions of the property as they may deem best, and good and sufficient deeds therefor to execute acknowledge and deliver.

"*Second.* That said parties of the first part shall make all advances needful and requisite for the further working or developing of the said property, as in their judgment shall be most expedient.

"*Third.* That all the avails, earnings and profits derived from the said property, or any part thereof, shall be received by the said parties of the first part, and shall be by them applied as follows:

"1. To the reimbursement of all moneys which may be expended by them, the said parties of the first part, in or about the care, management, developing or working of said property, or in any expenses connected therewith.

"2. After payment of all expenses as above, one quarter of all net profits resulting from the working of said property, or sales of any part or parts thereof, shall be credited and paid

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to said party of the second part, and three fourths part shall be credited to and retained by the said parties of the first part.

"*Fourth.* That the said party of the third part shall be employed as general manager of the said mining business and property of said parties of the first and second parts, in Montana Territory, during the continuance of this agreement, at a salary to be agreed upon between him and the said parties of the first part, which salary is to be paid as part of the business expenses connected with said joint property and business.

"*Fifth.* That said party of the third part shall and will, during the continuance of this agreement, faithfully devote his entire time and energies to the management of said joint property and interest, and the conduct of the said business of mining, and to the promotion of, and care for, the joint interest of said parties of the first and second parts.

"*Sixth.* That this agreement is to remain in full force for five years from the date thereof, unless sooner dissolved or canceled by the parties thereto, and that the terms hereof are to bind the legal representatives of said parties of the first and second parts, as well as said parties.

"*Seventh.* That during the continuance of this agreement, the parties of the first and second parts shall not, and will not sell, dispose of, transfer, assign or convey their, or any of their, individual interests in the property aforesaid, or any part thereof, but that all sales, or other dispositions of said property, or any part thereof, shall be for the joint account and benefit of said parties of the first and second parts in the proportion of three fourths to the former and one fourth to the latter.

"In witness whereof, the parties of these presents have hereunto unchangeably set their hands and seals the day and year first above written.

"ALEXANDER MCANDREW, [L. S.]
"SAMUEL WANN, [L. S.]
"M. J. ISAACS, [L. S.]
"JAMES P. ISAACS. [L. S.]

"Sealed and delivered in presence of
"CHARLES NETTLETON,
"M. GRAHAM.

[Stamp.]

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Which agreement is properly acknowledged before Charles Nettleton, commissioner for the Territory of Montana in New York.

Also a letter from defendants to plaintiff, fixing the rate of compensation to plaintiff under said contract, of which the following is a copy:

"No. 12 PINE STREET,
"NEW YORK, March 9, 1867.

"J. P. ISAACS, Esq., New York:

"DEAR SIR.—In accordance with agreement, dated February 2, 1867, executed between you, Mrs. Isaacs, and ourselves, we propose, in behalf of all parties interested in the Montana mining property, that you should, on your arrival out, take charge of the mining business and of said property as general manager, and that your salary for services to be rendered in that capacity shall be at the rate of four thousand dollars ($4,000) a year in Montana currency, allowing greenbacks to be worth ninety cents of the dollar of said currency, such salary to date from the first day of April next.

"The expenses of yourself and wife in getting out there to be charged to and be borne by the joint property and business, and your living expenses there to be in like manner a charge on the business.

"Very respectfully,
"MCANDREW & WANN."

This suit was commenced on the 15th day of May, 1869. The contract under which the plaintiff claims pay for one year's service is dated February 2, 1867, the alleged year's service ending April 1, 1868. It will be seen that this contract, by the terms thereof, is to continue in force for five years, unless sooner dissolved or canceled by the parties thereto. This suit was commenced long before the contract had expired, and long before there was, or could have been, a performance thereof by the plaintiff, providing the contract, by its terms, was an entire contract. If the contract is entire in its nature, full performance thereof by the plaintiff is a condition precedent to his right to sue thereon. And if performance by the plaintiff is prevented or made impossible by the action of the defendants, the plaintiff must, at all times during the continuance of the contract, be ready and willing to perform on

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his part, and he must not place himself in such a situation as to be unable to perform.

If the contract under consideration is an entire contract, that is, if full performance thereof by the plaintiff must be averred and proven before any right of recovery follows, and this contract was, by its terms, to continue for five years, then it could not be contended that this suit, at this time, ought to be maintained.

There are three remedies upon an entire contract, where one of the parties is prevented from performing by the action of the other party.

First. He may keep himself ready, willing and able to perform until the contract, by its terms, expires, and then bring suit on the contract itself.

Second. He may bring suit upon the *quantum meruit* for what his services are actually worth.

Third. He may sue for damages for breach of the contract by the opposite party.

In the present case the plaintiff has chosen to bring his action *upon the contract*, claiming pay for one year's service, and the right to bring this action in this form leads us to a consideration of the contract in question to ascertain whether it is entire or divisible in its character.

The contract provides that the plaintiff *shall* be engaged as general manager of the mining business of defendants *during the continuance of the agreement* (five years), at a salary to be agreed upon between the parties, to be paid as part of the business expenses connected with said property.

The letter above referred to, which forms a part of the agreement and contract, provides that the plaintiff's salary for services to be rendered under said contract shall be at the rate of four thousand dollars a year.

The contract does not provide *when* the plaintiff shall receive any pay for his services; and this important proposition, upon which this case hinges, can only be satisfactorily solved and determined by a resort to the authorities.

"If the contract be for a time certain and the servant leave without cause before the time expires, it has been held in many cases in England and in this country, that he has no claim for services he has rendered." 2 Pars. on Cont., 36; Chit. on Cont., 629–633.

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"Nor does it make any difference in this respect whether the wages are estimated at a gross sum, or are to be calculated according to a certain rate per week or month, or are payable at certain stipulated times, provided the servant agree for a definite and whole term; such an arrangement being entirely consistent with the entirety of the contract." *Davis* v. *Maxwell*, 12 Metc. 286; *Winn* v. *Southgate*, 17 Vt. 355.

"In regard to the contract itself, which was an agreement to work for the defendant for seven months at $12 per month, we are of opinion it was an entire one, and that the plaintiff having left the defendants' service before the time expired, can not recover for the partial service performed." 12 Metc. 287; *Hutchinson* v. *Wetmore*, 2 Cal. 310.

"The stipulation of monthly pay does not disjoin the contract, it is adopted only as the means of ascertaining the compensation." *McMillan* v. *Vanderlip*, 12 Johns. 165; *Rice* v. *Dwight Man. Co.*, 2 Cush. 80.

"Where the plaintiff agreed to work for the defendant for $104, or $13 per month: *Held*, that the contract was entire, and that the work for the whole period was a condition precedent to be performed before the plaintiff could sue for his hire." *Reab* v. *Moor*, 19 Johns. 337; *Larkin* v. *Burk*, 11 Ohio St. 561; *Lantry* v. *Parks*, 8 Cow. 63.

These cases, and numerous others that might be cited, seem to settle the doctrine that where the contract is for a time certain at a fixed price per day, per month, or year, and the servant leaves before the stipulated time expires, he has no claim on the contract for the services rendered.

If he is compelled to leave the service by the action of his employer, the rule is not changed. He must then resort to a suit for damages, or to the *quantum meruit* for what his services are actually worth, or he may stand at his post ready to perform until the contract expires, and bring his suit on the contract.

Applying these principles to the case before us, and its solution is comparatively easy and the right clear. This was a contract for five years' service, and the sum to be paid therefor was fixed at the rate of $4,000 per year, to be paid as part of the business expenses of the enterprise, but the time of payment is not fixed, and in view of the authorities above

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referred to, we must hold that this is an entire contract, and that work for the whole period was a condition precedent to be performed by the plaintiff before he could sue for his hire.

There is no time fixed for payment in this contract, and the law fixes the time, and that time is the period when the service is performed. It is one agreement, one contract, and performance must be shown before payment can be enforced.

We can not make contracts for parties, and however convenient pay by the week, month, or year might be, such payments can not be enforced unless the parties so promise and agree.

Suppose A contracts with B to labor for him for one year at the rate of $1 per day, can it be contended that at the close of each day's service A has the right to bring a suit on such contract to enforce payment for his day's labor? This would not be claimed, and yet the contract under consideration is precisely the same as the one supposed, only on a larger scale.

We do not intend to say that the plaintiff in the present case is without remedy; we only say he has mistaken the form of action he should have brought. If he has been wrongfully prevented from performing his contract by the defendants, he can sue for damages, and, upon the *quantum meruit*, for the value of the labor really performed; and at the end of the five years, if he has not forfeited his right thereto, he may bring his action on the contract for his services for the whole period.

II. The next question arising in the case is as to the sufficiency and competency of the evidence to support the second, third and fourth counts of the complaint. These counts allege that the defendants are indebted to the plaintiff for money paid, laid out and expended for the defendants by the plaintiff, for traveling and living expenses, at their special instance and request. The only evidence to support these averments, as shown by the record, is the last clause of the letter above referred to, which is as follows:

"The expenses of yourself and wife in getting out there to be charged to and borne by the joint property and business, and your living expenses there to be in like manner a charge on the business."

To the introduction of this evidence the defendants objected,

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upon the ground of irrelevancy and incompetency. The objection was overruled and the defendants excepted.

The language of this letter does not seem capable of a double meaning or of a doubtful construction. The parties were about to embark in a business enterprise, the success of which was uncertain. The pay of the managing agent was secured, and did not depend upon the success of the undertaking. A proposition was made that the traveling expenses of the agent in getting to the Territory, and his living expenses while there, should be borne by the business. The agent accepts, and thereby undertakes to perform the duties of his employment, and, in so doing, so far as these expenses are concerned, runs the hazard of making the business a success. This offer to pay expenses out of the business was designed to be a further inducement to the agent to achieve success. It was designed to give him an interest in the business to such an extent as that his expenses should depend upon the manner he performed his duties. The traveling and living expenses were to be a charge on the business and the property; that is to say, they were a lien thereon, as between the parties, to be paid from the proceeds thereof. This claim is in the nature of a mortgage. It is against the property and the business, and creates no personal liability.

Can it be successfully claimed that this offer of the defendants, that the traveling and living expenses of the plaintiff might be a charge upon the business and property of the enterprise, creates a personal liability to such an extent that the defendants can be proceeded against in the first instance, before any attempt is made to exhaust the remedy against the property itself? We think not, and we are therefore of opinion that the demand of the plaintiff against defendants in his second, third and fourth causes of action, for money paid, laid out and expended for traveling and living expenses, is not supported by this evidence, and that the objection to its introduction was improperly overruled.

III. Looking at the verdict of the jury in this case, we ascertain that they find for the plaintiff upon the second and third causes of action in the complaint, and that they compute interest therefrom, from the time the causes of action accrued to the time of trial. It will be remembered that these

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causes of action are for money paid, laid out and expended by the plaintiff for the defendants, at their special instance and request, and it is contended that the statute does not contemplate the payment of interest upon demands of this nature.

Interest is a creature of the statute, and the rate thereof differs in different States. The statute of Montana (Laws of 1865, p. 535), provides that creditors shall be allowed to collect and receive interest for all moneys after they become due, on any bond, bill, promissory note or other instrument of writing; on any judgment; also, upon money lent, or money due upon settlement of amounts; upon money received to the use of another and retained without the owner's knowledge, and on money withheld by an unreasonable and vexatious delay. The statute does not seem to contemplate the payment of interest upon money paid, laid out and expended for another, unless it could be claimed on the ground of unreasonable and vexatious delay; and, in such a case, the claim would have to be supported by the necessary averments and proof.

However reasonable the claim for interest may be in the present case, we must administer the law as we find it, and can not take upon ourselves the duties of the legislature.

IV. A further examination of the verdict of the jury discloses the fact that the jury found that the plaintiff had performed for the defendants under said contract, the services claimed in his complaint, that is, one year's service. The evidence shows that the plaintiff commenced work on the first of April, 1867; that during the summer of that season, he was absent from defendant's business and employment for more than one month, in pursuit of his own business; that on the 7th of January, 1868, he was discharged from the defendants' employment, and that on the 17th day of March, 1868, and before his year's service had expired, and of his own motion and without the knowledge of defendants, he left the Territory of Montana and went to the city of New York; and how the jury could find that the plaintiff, from the first day of April, 1867, to the first day of April, 1868, was in this Territory, working for defendants under this contract, we are unable to see. We would not disturb the verdict of a jury where there is evidence to support it, even though we were satisfied that the verdict was against the weight of evidence,

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but in this case it seems to be admitted that the plaintiff left the Territory before the year had expired, and for a portion of the time that the jury say he was here at work under the contract, he was in fact in New York city attending to his own affairs.

This finding of the jury is against the evidence.

V. This contract was made in New York, but to be performed in Montana. It is silent as to the place of payment, and as to the rate of interest in case payment is delayed. The question then occurs, where payment should be demanded, and the rate of interest that can be claimed if payment is delayed or refused.

This is a naked promise without any special condition as to the place of payment, and payment must be demanded of the maker where he is, or at his domicile: 2 Pars. on Cont., 583.

So that in the case before us it was necessary to aver a demand of payment, and if the defendants were then residing in New York City, or had their domicile there, it was necessary to prove demand at that place. And it would seem to result from the authorities, that if payment is delayed or refused after demand made, the party may collect interest, according to the rate of interest in the country where the contract is performed, if by the nature of the contract interest is recoverable by the laws of that country.

The creditor is supposed to borrow money where he is, and in the country where he is performing the contract, to supply the deficiency occasioned by the failure to pay on the contract, and it would be but justice to allow him to recover on the contract the same rate of interest he is compelled to pay by reason of a breach thereof, and this upon the ground that where a contract is made in one place to be performed in another, the law of either place may be applied.

VI. James P. Isaacs, the plaintiff in this action, is the husband of Maria Josephine Isaacs, one of the defendants. This is shown by the contract herein set forth. The covenants and undertakings of that contract are between husband and wife, directly without the intervention of a trustee. That is to say, the husband undertakes and promises, for a consideration, to work for his wife and two other persons for the period of five years; the wife and her co-contractors failing to pay, accord-

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ing to the terms of the agreement, as the husband alleges, he brings a suit against his wife and the other contractors, and recovers a judgment against them in the court below, and but for the appeal herein, the husband could have had an execution against his wife's property to satisfy the judgment and costs. Of course such a contract, and such a judgment, as between husband and wife, would be void at common law, but how far the rights of the parties are modified by statute, if at all, and whether the statutes of New York State or of Montana are to control, we are not called upon to decide, as the question is not made in the record before us.

It is proper, however, to observe that if any statute authorizes such a contract as the one under consideration as between husband and wife, and a suit by the husband against his wife to recover of her the amount due thereon, the strict letter of the statute must be followed in the institution and progress of such a suit, and it seems impossible that an action of the kind could be commenced and carried forward to judgment and execution without disclosing in the pleadings the true relation of the parties to the suit.

VII. It is assigned for error that the court refused to permit the defendants to withdraw their counter-claim as set up and described in the answer of defendants. The record shows that before the court had finished charging the jury, and after the testimony had closed, the defendants moved the court for leave to withdraw their counter-claim from the consideration of the jury, and as to said counter-claim to dismiss the same, which motion was overruled.

The effect of such a motion is simply an application to amend the pleading, and over such amendments the court should exercise a sound discretion, and it has power to grant or refuse amendments, and upon such terms as it thinks just and proper.

We do not think the granting or refusal of amendments can properly be assigned for error except in cases where manifest injustice is done, and this court will not consider an alleged error of this kind unless it is made apparent that the rights of the parties are being infringed.

Judgment reversed and cause remanded.

New trial granted.

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ABANDONMENT.

1. *Facts not amounting to mutual abandonment.*—Lessees ceased operations in 1873, to the knowledge of lessors, and no royalty was paid or demanded until 1876, when the first period of three years had elapsed. *Held*, that the jury could not presume from this that the contract was ended by the mutual consent of the parties. *Kemble Coal Co.* v. *Scott*, 80

2. *Abandonment by lessee must be pleaded.*—A lease of coal lands provided that if no coal were found and the lease was for that cause abandoned, no payments need be made. *Held*, that such defense must be set up in the answer and need not be negatived in the complaint. *McDowell* v. *Hendrix*, 96

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2. *Annual labor done outside of claim.*—The court below was requested to instruct the jury that "work done outside of a mining claim and with direct reference to the claim may be considered as work done on the claim," and the court qualified the same with this clause: "The evidence of such work having been done should be received with great caution, and it should appear clearly that such work was intended for the improvement of such claim and no other." *Held*, that the qualification was not error. *Kramer* v. *Settle*, 561

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1. *"Mining claim" defined.*—Mining claim is the name given to that portion of the public mineral land which the miner takes up and holds, in accordance with mining laws, local and statutory, for mining purposes, and the term includes the vein specifically located, all the surface ground located on each side of it, and all other veins or lodes having their apex inside the surface lines. *Mount Diablo Co.* v. *Callison*, 616

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2. *Execution of deeds to be proved.*—A deed for a mining claim executed and recorded in the district where the claim is situate, before any act was passed by the territorial assembly relating to such instruments, can not be given in evidence without proof that it was executed by the grantor:

1st. According to the local rules and customs of the district; or

2d. By the subscribing witnesses (if any), as provided in the 15th section of the chapter relating to conveyances. *Sullivan* v. *Hense*, 487

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4. *Grantor's own belief.*—In the construction of a grant the question is not what the grantor supposed he had done, but what he really has done by his grant. *Id.*

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1. *Successor to its organizers.*—The owners of a mining claim became incorporated and placed their corporation in possession. *Held*, that the title passed as effectually as if the transfer had been by deed. *Table Mountain Co.* v. *Stranahan*, 457

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CUSTOM. *Continued.*

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1. *Sufficient description of quartz mill.*—A lien notice describing the property as a "quartz mill, being at or near the town of Scottsville, in Amador county, known as Moore's New Quartz Mill," *held*, sufficient, there being no evidence of any other mill at that place so designated. *Tibbetts* v. *Moore*, 348

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1. *Location must cover vein, dip excepted.*—The foregoing sections of the act of Congress referred to, qualify and enlarge the common law right by which miners hold their locations, to this extent only: That the owner of a mining claim may follow his lode or vein from the apex found within his surface ground, on its dip, to any depth, although in its downward course it may so far depart from a perpendicular as to enter the land adjoining; but he can not go beyond his side lines on the course or strike of the vein. *McCormick* v. *Varnes*, 506

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DISCOVERY. *Continued.*

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1. *The district rules* must be complied with as well as the mining acts of Congress, when the former are not in conflict with the latter. *Gleeson* v. *Martin White Co.*, 429

2. *Distinction between local and general mining custom.*—Upon the question of the reasonable size of a mining claim a general custom may be shown whether prior to or later than the location; but a local rule stands upon a different footing and can not be introduced to affect the validity of a claim acquired previous to its establishment. *Table Mountain Co.* v. *Stranahan*, 457

3. *Judicial notice can not be taken of the rules*, usages and customs of mining districts, and they should be proved at the trial like any other fact, by the best evidence that can be obtained respecting them. *Sullivan* v. *Hense*, 487

4. *Local mining laws.*—Congress has given the local laws and customs of miners the force and effect of laws, so far as they are not in conflict with any superior law. *McCormick* v. *Varnes*, 505

5. *District rule must be in force.*—A miner's regulation to be valid, must be in force at the time of the location. It does not, like a statute, acquire validity from its mere enactment, but from customary obedience and acquiescence, and becomes void when it falls into disuse or becomes generally disregarded. *North Noonday Co.* v. *Orient Co.*, 529

6. *Whether in force—A question of fact.*—Whether a mining custom remains in force is a question of fact for the jury; having been adopted a presumption would arise in its favor, but parol proof that it was generally disregarded would show that it was no longer in force. *Id.*

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EXECUTION.

1. *Sufficient levy on leasehold.*—Under an execution against a lessee, a sheriff went upon the leased premises, examined them, etc., and afterward, out of view of them, he indorsed a description of them on his writ, and returned that he had levied on them, as described: *Held*, a good levy. *Titusville Novelty Iron Works' Appeal*, 17

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LEASE.

1. *Disclaimer of lessor's title and refusal to pay rent.*—Plaintiff alleged that in 1854 she had purchased 2,000 acres of land; that in 1864, she, with her husband, made a lease of 100 acres out of the tract, in consideration of $20,000 cash and a royalty in oil; that rent had been paid till 1872, when the defendant company, the assignee of her lessee, refused to pay any urther royalty, alleging that a certain party had ordered it not to do

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LEASE. *Continued.*

so. Plaintiff claimed that the refusal to pay rent on the grounds alleged amounted to a disclaimer of her title, and that the corporation thereby forfeited its estate in the term under the deed of lease. *Held*, that the refusal to pay rent on the grounds stated did not work a forfeiture of the unexpired term. *Gale* v. *Oil Run Petroleum Co.*, 1

2. *No disclaimer by words alone.*—An estate for years, in land, created by deed, will not be forfeited by a simple refusal to pay rent, or by any mere words, where there is no open act of hostility to the lessor's title. *Id.*

3. *Lease distinguished from license—Trespass by lessees.*—By oral agreement the owner of certain land gave plaintiffs the right to enter thereon for mining purposes, and the exclusive right to mine in or upon the same and to take away ore therefrom for a certain rent in kind. *Held*, that plaintiffs thereby acquired an interest in the land and might maintain an action of trespass against third persons for mining upon and taking ore from such land. *Ganter* v. *Atkinson*, 13

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6. *Facts of the case—No breach possible after forfeiture.*—Miller, the lessee of a colliery, agreed with plaintiff, a coal company, to sell them all the produce of the mine, etc., they to pay him all mining expenses at stated periods, etc., and if default were made, the lessee might treat the agreement as forfeited. At the same time he mortgaged his leasehold as collateral for the fulfillment of his part of the agreement. After default in payments by the company, and after notice from Miller of his election to declare the contract forfeited, the plaintiff sued on the mortgage, alleging that the lessee had broken his covenants: *Held*, that nothing was due on the mortgage, as the agreement had been forfeited for the breach of plaintiff's own covenants. *Columbia Coal Co.* v. *Miller*, 21

7. *Idem.*—Miller had confessed judgment to other persons, and after the breach by plaintiff of its covenants, and notice from Miller of the assuming of the agreement, the leasehold was sold under the judgment. *Held*, that this was not a breach by Miller; the agreement being at an end by reason of the precedent breaches of the plaintiff. *Id.*

8. *Additional openings.*—A lease which gives the right to take out all the coal beneath a certain surface confers also the right to make all necessary openings to reach the coal; the lessee is not restricted to a single opening. *Trout* v. *McDonald*, 32

9. *Secret holder of deed confirming lease by receiving rent.*—Trout made a voluntary conveyance of a farm to his wife in 1867, but continued in possession till his death, in 1873. Just before his decease he let a lease of the coal to McDonald on a part of the farm. The lessee worked under the lease till the decease and afterward, paying royalty to the widow. The deed was not recorded and the lessee did not know of its existence

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LFASE. *Continued.*

till 1874. Upon bill filed by the widow to restrain his mining, it was *held*, that she had ratified the lease and was bound by it, without regard to whether she might have avoided the lease upon proper action after her husband's death. *Id.*

10. *Receipt of rent ratifies lease.*—The receipt of rent by a mining company without objection is a ratification of a lease made on their behalf by a subordinate without authority to make such lease. *Chamberlain* v. *Collinson*, 36

11. *Forfeiture for default in payments.*—The owner of a leasehold interest in an oil well, with its machinery, etc., sublet it to D. for ten months, with privilege of purchase—payment to be made in installments. If default were made in any of the payments, the payments already made were to be treated as liquidated damages. D. went into possession and made but one payment. Afterward the property was levied upon and sold by an execution creditor of D. *Held*, that there was no title in D. to pass by the sale, by reason of his default in the further payments. *Christie's Appeal*, 42

12. *Lessee may not open new mine.*—A lessee of lands for years is entitled to work an open mine upon the premises unless restricted by the terms of his lease; but he has no right to open a new mine unless this privilege be expressly granted. *Harlow* v. *Lake Superior Iron Co.*, 47

13. *Narrow construction not favored.*—In construing a lease it is contrary to well settled rules to give it a narrow and technical interpretation based upon some particular word or clause; the intent must be gathered from an examination of the instrument as a whole, and all clauses made consistent if possible. *Id.*

14. *The special lease in question* in this cause *construed* to be, not a lease of the lands with the privilege of mining, or a lease of the lands together with the minerals, but a grant of a specific mining privilege, particularly set forth in the lease, excluding all other uses except as incident to the mining rights granted. *Id.*

15. *The reservation of the agricultural use* to the lessor of all premises not needed for mining purposes, is inconsistent with an intent to grant an ordinary leasehold interest. *Id.*

16. *Indivisible privilege.*—The right leased, being that of an undivided half, gave the lessee the right to prospect over the entire lands, and open and work as many mines as he deemed proper; this entire right he could assign or convey, but he could not carve it up and parcel it out into several distinct rights, to be held and operated by more than one person, company or corporation; his right being a single one could not be subdivided, and a similar undivided right remain vested in the lessor. *Id.*

17. *In what case duty of lessor to fix boundary.*—Where a party is the lessor of two adjoining mines, the rule, governing adjacent mines when held by different owners, that the lessee must ascertain the dividing line at his peril, does not apply; for the lessor, having the power to protect himself by covenant, if he neglects to do so, can not plead rules resulting *ex necessitate rei* as against his own grant. *Freck* v. *Locust Mountain Co.*, 57

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LEASE. *Continued.*

18. *Entry for non-payment.*—Where the tenant fails to comply with such covenant and the landlord has made demand at the time and place and in the manner prescribed by common law, and such demand is not complied with, the landlord may, at his option, enter upon the leased premises, or such part thereof as can be entered upon by him. *Bowyer* v. *Seymour*, 67

19. *Election to bring ejectment.*—But if he does not re-enter, in fact, he may bring ejectment under § 16, Chap. 93 of the Code. *Id.*

20. *Contract construed as a present lease with fixed covenants, and not as an executory arrangement with stipulations.*—Plaintiffs agreed to "grant, let and lease" for eleven years, the exclusive right to mine the iron ore from certain described tracts. In consideration thereof the defendants, an iron company, bound themselves to pay on the 15th day of each month fifty cents per ton for every ton of iron ore mined and taken away the month previous. Defendants were to pay for the first year royalty upon as many tons as they might be able to mine, but for any period of three years thereafter the rent was to be in the aggregate not less than $10,000. At the end of four years defendants were sued for $10,000 under this covenant. *Held*, that the agreement was not an executory but an executed contract; that it was not an agreement for a lease, nor a license, but a present lease; and that it contained nothing to support the idea that the clause for payment of the $10,000 was a mere stipulation which might be avoided by abandonment or surrender, or that the amount was not payable until the expiration of the entire term. *Kemble Coal Co.* v. *Scott*, 80

21. *Lessee taking risk of title.*—In the negotiation immediately preceding the agreement, the vice-president of the company, who conducted the negotiation, had written to plaintiffs that if the lease could be effected defendants would take the risk of plaintiffs establishing their title to one of the tracts. *Held*, that it was proper to leave to the jury, and for them to find, "that the defendants took the tract with knowledge of the title and at their own risk." *Id.*

22. *Lease entered into after "drilling"—Unexpected encounter with "horsebacks"—Minimum rent.*—The answer averred that both parties went into the lease upon the result of experiments by drilling; that such drilling indicated a vein four feet thick and free from obstructions; that actual mining developed a vein only three feet thick and full of "horsebacks" and "troubles." The lease had provided a minimum rent with a clause conceding release from payments in case no coal were found, in which contingency lessee could abandon. *Held*, that the developments stated were no ground for relief, and that defendants must pay the minimum rent and could not set up abandonment so long as they continued in possession. *McDowell* v. *Hendrix*, 96

23. *Estoppel, after virtual surrender, to demand possession.*—Where a lessor, after serving notice to test his right to a forfeiture, had commenced proceedings to such effect, and after sundry interlocutory orders had been made, the attorney of the receiver holding the tenant's interest informed the lessor that they would not be contested further, and told the

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LEASE. *Continued.*

lessor to take possession, which he did, leasing the property to another who made expenditures in preparing to resume work, it was *held*, that after such abandonment and surrender of possession and action under it the receiver was estopped to retract such virtual surrender of the lease. *Wilmington M. Co.* v. *Allen*, 106

24. *Instrument construed as a coal lease.*—An instrument which purports to lease and convey all the coal in certain land for the term of twenty years, in consideration of $400 per annum, to be paid in monthly payments of $33.33, is not an absolute grant of all the coal under the land, but is a lease of all the coal which the second party can mine during the term limited. *Austin* v. *Huntsville M. Co.*, 115

25. *The bare execution and delivery of a coal lease without entry* or taking possession of the land or coal, does not vest any property in the coal in the lessee. *Id.*

26. *Construction of lease as to minimum rent, royalties and penalties.*—By the terms of a mining lease, lessees agreed to test land for coal. If they found sufficient to justify mining, they were: (1) To sink a shaft and be mining within one year, or in default thereof, pay $100 per month until such shaft was in operation. (2) They were to pay a royalty of 25 cents per ton, and to mine enough to make the royalty at that rate amount to $1,200, or, in default thereof, pay $1,200, in monthly installments of $100 each; "all payments herein provided for of one hundred dollars per month" to apply on the rent or royalty. *Held*, that the lessees, if they found the coal, were bound: 1. to sink the shaft and be mining within one year, or pay $100 per month as a penalty. 2. That the first and second covenants were independent of each other. 3. That lessees were bound to pay a minimum rent of $100 per month in any event, after they had sunk a shaft; the same to apply on the royalty of 25 cents per ton, in case the same aggregated more than $1,200. *Watson Coal M. Co.* v. *Castell*, 130

27. *Relation of lessor to tenant's assignee.*—There is a privity of estate between the lessor and the assignee of the lessee which makes such assignee liable for rents or royalties. *Id.*

28. *Private custom of lessor.*—A lessee is not bound by the private custom of his lessor in regard to his mines or lands, not shown to have been known to him when he entered upon them. *Beatty* v. *Gregory*, 234

29. *One month's notice* will terminate a tenancy at will. *Desloge* v. *Pearce*, 247

30. *Leaseholds, not "goods and effects."* Oil leasehold interests and buildings on leaseholds are not goods and effects within the meaning of the act relating to foreign attachments; therefore, when the sheriff treated such property as personalty and returned that he had taken it into his actual custody, and in serving subsequent writs did not go again to the property but simply indorsed the writs and served a summons on the garnishees, such service was not a compliance with the act. *Vandergrift & Forman's Appeal*, 397

See ABANDONMENT, 1, 2; COLLIERY, 1; EXECUTION, 1; FORFEITURE,

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LEASE. *Continued.*

1-3; LEVEL, 1, 2; LICENSE, 3, 5, 6, 43-45; LIEN, 1; LUNATIC, 2; MEASURE OF DAMAGES, 1, 2; TRESPASS, 1, 2.

LEVEL.

1. *Evidence of local meaning of "level."*—In an action for breach of a covenant, in a lease of coal mines, to get the whole of the veins of coal lying under certain closes, "not deeper than or below the level of the bottom of the mine," at a certain point, evidence is receivable to show that by the miners in the neighborhood the word "level" is used in a certain peculiar sense. *Clayton* v. *Gregson*, 141

2. *The word "level" when used as a mining term*, in the coal district of Lancashire refers to the inclination of the strata, and not to a horizontal plane. The expression "below the level of the bottom of the mine" explained accordingly. *Id.*

LIBEL AND SLANDER.

1. *Slanderer of mine, liable in damages.*—Where one knowing more than others of the occult qualities or internal values of land, and knowing or believing the condition to be one thing he represents the facts differently, to the prejudice of the owner, he is liable in damages. *Paul* v. *Halferty*, 149

2. *Sale prevented by officious libel.*—Where one has been prevented from selling his land or other property by the malicious interference of another, he may maintain his action for the damage suffered. *Id.*

3. *Describing mine as pockety.*—Where the plaintiff, being in negotiation for the sale of a tract of iron land, the purchase was broken off upon the statement (proved to be false) of the defendant, by letter, that the mine was a "pocket," and that "the ore was nearly played out." *Held*, that the defendant was liable in damages. *Id.*

4. *Remedy in tort for the libel—Against vendee, on contract.*—If there had been a contract for the purchase of the land, binding upon the vendee, and he had refused to comply, being biased by such false representations, the remedy of the plaintiff would have been against the intending purchaser on his contract. *Id.*

5. *Article libelous on its face.*—When an article in a newspaper imputes to a person grave offenses and dishonest practices, which, if established, would bring him into general contempt and disgrace, it is actionable on its face. *Wilson* v. *Fitch*, 155

6. *Proof of colloquium.*—When an alleged libel is actionable *per se*, and still a colloquium is inserted in the complaint, it is unnecessary to prove the colloquium. *Id.*

7. *When colloquium not necessary.*—A colloquium is not necessary, except when the libel is not actionable on its face, but has a covert libelous meaning. *Id.*

8. *Evidence of belief in action for libel.*—In an action for damages for publishing a libel, in which it is stated that the owners of a mine believe that they have been swindled by the plaintiff, testimony that such owners, at the date of the publication, believed that they had been swindled, is not admissible, either in justification or mitigation of damages. *Id.*

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LIBEL AND SLANDER. *Continued.*

9. *Idem.*—If the libel assert the defamatory matter, not as a fact, but only as the belief of the author, or as a rumor, or general suspicion, the libel can not be justified by proof that the author believed it to be true, or that there was such a rumor, or general suspicion. *Id.*

10. *Proving the truth.*—In order to justify such publications of the belief of the author or of others, the defendant must prove the truth of the matter published. *Id.*

11. *Privileged communication—Proof of malice.*—The trustee of a private corporation is not a public officer in such a sense as to enable the publishers of a newspapers to claim an article published concerning him and criticising his conduct as trustee, as a privileged communication, and therefore compel such trustee, in an action for libel, to prove express malice. *Id.*

12. *Defamatory publication not privileged.*—A defamatory publication in a public journal, concerning a private person, is not privileged, so as to require proof of express malice on the part of the plaintiff, simply because it relates to a subject of public interest, and was published in good faith, without malice and from laudable motives. *Id.*

13. *Idem.*—In such case the publisher, in order to rebut the presumption of express malice, should be allowed the fullest opportunity to show the circumstances under which the publication was made. *Id.*

14. *Previous publication by others on same subject.*—In an action for a libel, the defendant can not introduce in evidence libelous articles, published by other persons before the publication of the alleged libelous article, whether they refer to the same transactions spoken of in the article published by the defendant, or to other matters. *Id.*

15. *Common rumor of guilt.*—In an action of libel, the defendant can not introduce evidence to show that prior to and up to the time of the publication by defendant, the plaintiff had been generally reported and suspected to have been guilty of the acts imputed to him in the libel. *Id.*

See MEASURE OF DAMAGES, 4.

LICENSE.

1. *Incidents of license.*—Upon the construction of a deed of bargain and sale of a manor, wherein the grantee covenanted that the grantor might dig for ore, the covenant being preceded by the formula, *proviso semper*, it was *held:* That such covenant amounted to the grant of an estate. 2. That such estate or interest could not be parted or divided. 3. That if assigned to two or more, they must work for ore as one person, with the workmen employed together by the two or more owners. 4. That the license did not exclude the right of its maker to dig also. 5. That the *proviso*, being coupled with the words of grant, did not create a condition. *Lord Mountjoy's Case*, 175

2. *Right to mine reserved, is not an exclusive liberty.*—In a release by the mortgagor of lands to a third party (the mortgagee conveying at the same time so that the fee and the equity passed together), there was inserted a covenant by the purchaser that it should be lawful for the party of the first part, "his heirs and assigns, at all times, to enter upon the lands, to search and dig for coal, and to take and carry away the same to

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LICENSE. *Continued.*

his and their own use." *Held*, that this was only a license, and passed no interest in the soil, such as to exclude the purchaser, and those claiming under him, from getting coal there; nor could it operate as an exception or reservation out of the grant, because the legal title was not in the grantor at the time. *Chetham* v. *Williamson*, 176

3. *Instrument construed as license not lease.*—The owner of the fee granted to the plaintiff and his fellow adventurers "full liberty, license, power and authority, to dig, work, mine, and search for tin and tin ore, etc.," within certain lands described; to raise, make merchantable and dispose of the ores, etc., with certain reservations out of "the premises granted," for the term of twenty-one years, upon fixed royalty. *Held*, that the indenture amounted to a license and not to a lease. *Doe* v. *Wood*, 182

4. *A licensee may not maintain ejectment*, at least not for mines beyond the limits of his actual workings. *Id.*

5. *Distinction between lease and license*, and the proper words to create each, stated. *Id.*

6. *License a defense in tort.*—The plaintiff, lessee for years of an ore bed, entered into an agreement under seal to supply the defendant with specified iron ore annually, at a certain price, with a stipulation that if the plaintiff should at any time refuse, or not be able to dig or raise the ore at a fair price, the defendant should be at liberty to employ others to dig or raise it for him; the plaintiff having neglected to furnish ore, the defendant entered and dug the ore. *Held*, that an action on the case sounding in tort could not be maintained against the defendant; the plaintiff's real remedy, if any, not considered. *Arnold* v. *Richmond Iron Works*, 193

7. *License distinguished from grant.*—Where one owning a large tract of land, grants, bargains and sells a part of it, and for himself, his heirs, executors and administrators covenants with the grantee, his heirs and assigns, that the grantee, his heirs and assigns, may dig, take and carry away *all iron ore to be found* within the ungranted portion of the tract, paying so much a ton— this is not a grant of the ore, but of the right or privilege to dig, take and carry away ore to be found; and no property accrues in the ore until the privilege has been exercised. *Grubb* v. *Bayard*, 199

8. *The right is without stint*, but is not exclusive of the owner of the soil. *Id.*

9. *"All" construed.*—The use of the word "all," referring to the ore is not necessarily exclusive of the owner's right; it describes the extent of the grant—not its exclusiveness. *Id.*

10. *Indivisibility.*—Such license is indivisible, and an assignee of an undivided interest (though the holder of all but a small fraction) has nothing and can not maintain action against the owner of the soil, excluding him from exercising the license. *Id.*

11. *License revocable only after compensation or notice—Statute of Frauds.*—Under a parol license to mine upon a royalty where the occupant has entered and made expenditures, the license can not be revoked without compensation, or giving the party the six months' notice to quit

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LICENSE *Continued.*

to which a tenant at will is entitled; and although such license is within the Statute of Frauds, still, when connected with the matter of improvements, it is voidable only after such compensation or notice. *Bush* v. *Sullivan*, 214

12. *Grant of right to get ore—Statute of Frauds.*—The "right to dig and carry away ore" from the mine of another, is an incorporeal hereditament or easement, and the contract for the sale of such a right, to be binding in law, under the Statute of Frauds, must be in writing. A verbal contract conferring such a right, though not binding under the Statute of Frauds, will, nevertheless, operate as a verbal license, and, while unrevoked, will protect the person to whom it was given from *trespass quare clausum fregit*, for digging ore, and vest in him the property in the ore that is actually dug under it. *Riddle* v. *Brown*, 219

13. *Parol license revocable but not assignable—Trespass.*—A verbal license to dig and carry away ore is revocable at the pleasure of the party by whom it is given, and is, moreover, personal, and not assignable. Such a verbal license given by A to B, and by B afterward transferred to C, will not justify C in entering by force the enclosure of A, in which the bank or mine of ore is situated—A being at the time the owner of the freehold, and warning C not to attempt to enter. C, in such a case, becomes himself a trespasser, and he may be repelled by A with all the force necessary to protect his possession. *Id.*

14. *Incorporeal hereditament.*—A grant of the privilege of raising iron ore on the lands of the grantor at a certain price per ton, is an incorporeal hereditament; it is not a sale nor is it a mere license revocable at the will of the grantor. *Johnstown Iron Co.* v. *Cambria Iron Co.*, 216

15. *Not exclusive.*—Such a right is not exclusive in the grantee, but to be enjoyed in common with the grantor, his heirs and assigns; *Caldwell* v. *Fulton*, 31 Pa. St. 475, distinguished. *Id.*

16. *Licensee, a tenant at will.*—A parol license to mine, reserving royalty, followed by expenditure made by the licensee, can not be terminated by the licensor without giving the notice to which a tenant at will is entitled. *Beatty* v. *Gregory*, 234

17. *License limited to single vein.*—License to mine: *Held*, under the evidence, restricted to working in the vein and not to allow digging for float and to be confined as to the ground to one range at a time. *Upton* v. *Brazier*, 243

18 *Not exclusive.*—A license, unless otherwise clearly expressed or necessarily implied, will not be held to be exclusive. *Id.*

19. *Revocable.*—A parol license, not accompanied by possession or expenditure, is revocable. *Id.*

20. *Extent of right created by parol license—Statute of Frauds.*—A parol license is a privilege to do some particular act upon the land of another, but as a license to mine purports to confer the right to carry away a part of the realty itself, it creates necessarily an interest in lands, is clearly within the Statute of Frauds, and must be in writing—otherwise it is effectual only to create an estate at will. *Desloge* v. *Pearce*, 247

21. *Revocability.*—A parol license is essentially terminable by notice. *Id.*

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LICENSE. *Continued.*

22. *Protection to licensee.*—A license protects against an action for trespass or for any act done under, or condition caused by, the exercise of the privilege. *Id.*

23. *Licensee's possession not adverse.*—The right to enter and dig for ores is an incorporeal hereditament, and can only be acquired by deed or by an adverse enjoyment for a sufficient length of time to furnish a presumption of a grant; but in all cases, to raise a presumption of a grant, the possession must be adverse, and a licensee paying royalty has no adverse possession. *Id.*

24. *License, with possession, not within the Statute of Frauds.*—A parol license to mine, under which possession has been taken, and which license is established by the evidence of the licensor himself, is not within the Statute of Frauds. *Anderson* v. *Simpson*, 262

25. *Idem—License, without possession.*—But a license not followed by possession taken under it is within the Statute. *Id.*

26. *Irrevocable license—Estoppel.*—The rule that a license to do something on the licensor's land, followed by expenditure on the faith of it, is irrevocable, rests upon the principle of estoppel, because the parties can not be placed *in statu quo*. *Huff* v. *McCauley*, 268

27. *Vested rights.*—Equity treats the license thus executed as a contract giving absolute rights. *Id.*

28. *Statu quo.*—Where there has been only a consideration paid, there is nothing in the way of restoring the parties to their original condition. *Id.*

29. *Consideration not paid.*—A license is not converted into a contract, giving irrevocable interests in land, by the mere fact that a consideration was agreed to be paid for it. *Id.*

30. *Profit a prendre.*—A contract that one may take coal for his works from the land of another, is a right of profit *a prendre*, is incorporeal and incapable of creation except by grant or prescription *Id.*

31. *Instrument construed as license.*—A grant to Fell, his heirs, executors, administrators and assigns forever, of "the free right to dig coal at the coal bed on my lot," with the privilege freely to carry the coal, right of egress, regress, etc., at all times hereafter: *Held*, an incorporeal hereditament. *Gloninger* v. *Franklin Coal Co.*, 273

32. *Not exclusive.*—The grant is not of an exclusive right; it is a privilege to dig coal at a specified bed and carry it away, not interfering with the owner's right to mine *ad libitum*. *Id.*

33. *Revocability of license.*—Generally a parol license is revocable at the will of the licensor, even although a consideration may have been paid for it; but a parol license executed may become an easement on the land, and where acts have been done in reliance upon the license, the licensor will be estopped from revoking it to the prejudice of the licensee. *Dark* v. *Johnston*, 283

34. *License not transferable.*—A license is a personal privilege and not assignable; an assignment by a licensee determines his right. *Id.*

35. *Facts of the case.*—McGuire granted to Baird a right to sink one or more wells on his land, and agreed to convey to Baird if oil was found;

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LICENSE. *Continued.*

also to grant him an exclusive right to sink wells on other land at $100 for every ten years, for every well Baird might continuously pump oil from; if he should fail to find oil, to have the right to remove his machinery, etc.; if oil were found, the right to pump to continue as the rent should be paid. *Held*, 1. To be a license to Baird. 2. That Baird having made improvements, McGuire could not revoke the license as to him. 3. That Baird having assigned the license, it was determined. *Id.*

36. *Licensee's possession no defense to unlawful detainer.*—Contract allowing a party for good consideration "to dig all the ore that could be found on the land" of the plaintiff at a royalty. *Held*, a license merely, and no defense to the licensor's action for possession—leaving, however, to the licensee, a remedy for the licensor's improper exercise of the right of possession; the licensee having a right to a qualified possession. *Neumoyer* v. *Andreas*, 292

37. *License, within the Affidavit of Defense Law.*—Cowan, by writing, granted to Johnston and others, as partners, the privilege to take clay from his land for twenty years, at twelve cents per ton, they to pay $150 at the end of every six months, although they should not then have taken away so much clay as would amount to that sum. *Held*, that the writing was an instrument for the payment of money within the Affidavit of Defense Law. *Johnston* v. *Cowan*, 299

38. *Construction—Minimum rent.*—The writing was an agreement to pay for the privilege of taking clay, whether exercised or not, and the installments were neither liquidated damages nor a penalty, but an alternative price. *Id.*

39. *Refusal, by licensor, to specify place of digging.*—Defendant agreed to allow plaintiff to dig molding sand on plaintiff's land, at an agreed rate per ton, the places for digging to be designated by defendant. After exhausting the sand at the first point designated, defendant refused, upon request, to designate any other place at which he might dig. *Held* a breach of his contract by defendant. *Hurd* v. *Gill*, 306

40. *License by working under company rules—Revocation—Title in ore severed.*—In 1838 the proprietors of the Mine La Motte published a set of rules under which the miners signing them had a right to extract minerals. In 1848 a new set of rules was promulgated among them, the right of revocation being expressed. Plaintiff worked under the rules, and after notice of revocation quit work, but afterward resumed, and extracted ore, which the company seized. *Held*, that the agreement was not a lease, but a license revocable at the pleasure of the proprietors, and that the miner, after resuming against objection, was a mere wrongdoer and acquired no title to the ore severed. *Lunsford* v. *LaMotte Lead Co.*, 308

41. *License not revocable without compensation or notice.* A parol license to mine is valid and can not be terminated without compensation to the licensee, or by the notice required to determine a tenancy at will; and such license is good against subsequent lessees or licensees having notice. *Harkness* v. *Burton*, 318

42. *Legislative charter, allowing mining from river beds.* An act of

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LICENSE. *Continued.*

assembly of South Carolina, of March 1, 1870, "gives and grants" to certain parties named "the right to dig, mine and remove," during twenty-one years, from the beds of navigable waters within the State, the phosphate deposits therein, requiring the grantees to pay a bonus of $500, and a royalty of $1 per ton. *Held*, upon bill filed by another company to which afterward similar privileges had been granted, that the former act conferred no *exclusive* privileges—distinguishing the case from *Massot* v. *Moses*, (8 M. R. 607,) and following *Doe* v. *Wood* (9 M. R. 182.) *Bradley* v. *South Carolina M. Co.*, 323

43. *License distinguished from lease.*—An instrument in writing, under seal, granting permission to mine "so long as they do regular mining work on said lot" is a license, irrevocable except in case of breach, but is not a lease because it does not pass any such estate in possession as would entitle the grantee to maintain ejectment. *Boone* v. *Stover*, 326

44. *License misnamed lease, in the pleadings.*—In an action for breach of covenant for quiet enjoyment, the styling of an instrument as a lease when in fact a license, the contents of the instrument being known to the defendant, is not such a variance as to authorize a nonsuit. *Id.*

45. *License distinguished from grant.*—A contract giving a party an exclusive right to dig ore in certain lands, no estate or interest in the land being granted, is a license, and not a grant or demise. *East Jersey Co.* v. *Wright*, 332

46. *License defined.*—A license is an authority to go upon the land of the licensor, and do an act or series of acts there, but passes no estate or interest in the land. *Id.*

47. *When irrevocable.*—Unless coupled with an interest, or an equity has been created by acts done in pursuance of a license, a license is always subject to revocation in either of the following methods: (1) By the will of the licensor; (2) by the death of either of the parties; or, (3) by the conveyance of the land upon which it was intended to operate. *Id.*

See ABANDONMENT, 4; FIXTURES, 1; FORFEITURE, 3, 4; LACHES, 1; LEASE, 3.

LIEN.

1. *Tributer's lien on ore—Lien in the miner—Title in the operator.*—The owner of lands set apart certain lots to tributers, who were to receive a certain weight in lead for a certain weight in ore brought to bank, or cash, at their election. The contract specially provided that no interest in the ore should vest in the miners. *Held*, that the miners had no title in the ore and no right to sell it, but that they had a lien upon the ore and the right to retain possession till the compensation was paid or tendered. *Granby M. Co.* v. *Turley*, 343

2. *Lien not affected by sale of partner's interest.*—Miners' wages by statute are a lien upon their debtors' property; but when a firm is the debtor, a judicial sale of the separate interest of one partner does not entitle the miners to preferred payment out of the money so made, because it does not affect nor divest their miner's lien. *Beatty's Appeal*, 346

3. *Where a creditor's lien is not divested* by a judicial sale, he has no claim on the proceeds. *Id.*

4. *Definite description essential in the decree.*—Where a lien notice

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LIEN. *Continued.*

designated the ground around the mill sought to be covered in general terms the decree may properly be made to define it specifically, and in default thereof, the purchaser might be held to take no land beyond that covered by the buildings. *Tibbetts* v. *Moore*, 348

5. *Delivery of materials.*—Materials may be held to be "furnished" when delivered, though not at the building for use in which they are intended. *Id.*

6. *Intervening lien claimants.*—Lien claimants appearing in obedience to the statutory notice to present their proof of lien, are not governed by the strict rules of intervenors. *Id.*

7. *Defects in the petition of* an intervenor in summary proceedings under the Mechanics' Lien Law should be taken advantage of by demurrer. *Id.*

8. *Variance as to party furnished.*—Where a lien notice stated that materials were furnished to Moore & Co., and the building was, in fact, owned by Moore alone: *Held*, that the material fact was, that the materials were furnished for and used in the construction of the building in question, and that the lien could be enforced against Moore. *Id.*

9. *A miner's lien law not retroactive in terms*, will not be construed to give a lien for work done before its passage. *Hunter* v. *Savage M. Co.*, 357

10. *Appropriation of payments.*—Where payments are made from time to time on account of labor, for a part only of which labor the miner has a lien, the payments will be credited against that part of the debt which is unsecured. *Id.*

11. *The complaint of a party claiming a miner's lien* need not show whether the contract sued on was an express or whether an implied contract. *Nolan* v. *Lovelock*, 360

12. *Claiming in excess of the real amount* does not vitiate the lien for the real amount due. *Id.*

13. *Hauling quartz to a quartz mill* is "performing labor for carrying on the mill, and gives the teamster a lien on the mill. *Hope Mining Co. In re*, 364

14. *Liberal construction* to be applied to the Mechanics' Lien Law. *Id.*

15. *Repeal of the statute* after the lien has attached by the performance of the labor, but before the filing of the statutory notice, does not defeat the lien. *Id.*

16. *Denial of legal conclusion.*—The denial that plaintiff has a lien is a mere traverse of a conclusion of law. *Bradbury* v. *Crouise*, 366

17. *Co-tenant's lien for improvements preferred against mortgage.*—Where one tenant in common, with the consent of his co-tenant, has improved the estate before the execution of a mortgage by the latter, one half the outlay will be a prior lien to that of the mortgage, and will be first paid out of the proceeds of sale under the mortgage. *Stenger* v. *Edwards*, 368

18. *No lien for receipts against each other.*—When one tenant has collected an excess of his share of the rents of the estate, no lien attaches in favor of the other tenant; his remedy is by action for an account. *Id.*

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LIEN. *Continued.*

19. *Omission of allegation of time of filing lien notice.*—Where a complaint fails to show that suit to foreclose lien was brought within the statuory period, the defect should be taken advantage of by demurrer. After issue joined and a decision on the merits, it will be supported by every legal intendment. *Skyrme* v. *Occidental M. Co.*, 370

20. *Assignability—Action by assignee.*—Mechanics' liens are assignable; the lien may be enforced by action in the name of the assignee; the assignee of several claims may foreclose all in one action, and an assignment of the lien carries the debt. No particular form of words is necessary to constitute an assignment. *Id.*

21. *Effect of repeal of statute.*—Where the Mechanics' Lien Act was repealed and at the same time substantially re-enacted: *Held*, that liens accrued under the old act were not divested by the repeal. *Id.*

22. *Improper joinder, cured.*—Where sundry lien claimants filed a joint lien, and afterward filed their several liens as they should have done in the first instance: *Held*, that they could treat the first filing as a nullity. *Id.*

23. *Day labor and contract work mingled.*—Work was done by many miners under the direction of the foreman, by the day, alternating with small contracts with sundry parties among the miners for running a few feet at so much a foot. *Held*, that it was one continuous transaction to be protected by a single claim for lien on behalf of each miner. *Id.*

24. *Effect of receiving note and filing on the note instead of for the labor.*—A lien notice stating that it is filed to secure a note—the note having been given for labor on the mine: *Held*, that though informal, it should be sustained as a valid claim of a lien for the labor, and that the taking of a note in settlement is no waiver. *Id.*

25. *Construction.*—The Mechanics' Lien Law is to be liberally construed. *Id.*

26. *Foreclosed in equity—Personal judgment.*—A proceeding to enforce a miner's or mechanic's lien is substantially a suit in equity, notwithstanding the practice of entering a personal judgment usual in such cases. *Davis* v. *Alvord*, 384

27. *Initiation of lien must appear affirmatively.*—A lien attaches from the commencement of the work; the date of the commencement of the work, its character to show that it is a lien, and the completion of the work, must appear upon the pleadings. The lien notice and affidavit are not legal proof of the date of the commencement of the lien. *Id.*

28. *Occasional repairs.*—A lien after the work has been substantially performed can not be kept alive by occasional repairs. *Id.*

29. *Work on mill and mine.*—Work done on a quartz mill and work done in a quartz mine (separate some distance therefrom) is work done upon two different parcels of property, and the lien upon each can not, by agreement, be apportioned arbitrarily between them, although done under one original contract. *Id.*

30. *Superintendent has no lien.*—The superintendent of a mining company, having general charge of its mines and works and employed at a monthly salary, can not claim the benefit of the Mechanics' Lien Law: such

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LIEN. *Continued.*

a claim is analogous to that of a builder charging for superintending his own workmen. *Smallhouse* v. *Kentucky Co.*, 388

31. *Repeal of old and passage of new lien law.*—Where a new mechanics' lien statute contains all the provisions of the old act which it repeals, necessary to support a lien—it must be held that no intention existed to destroy existing rights. *Capron* v. *Strout*, 391

32. *The foreman of a mine* is entitled to a lien. *Id.*

33. *Appropriation of payments.*—Where the foreman of a mine also boarded the employes and received money from time to time not exceeding his claim for board, without special appropriation of the fund to any particular item: *Held*, that he was not bound to apply it to the oldest claims but could credit it to the board account. *Id.*

34. *Hiring from month to month.*—A general hiring of miners at a per diem to be paid monthly, is a hiring from month to month. Either party may terminate it at the end of any month without notice though work has been done under it for many successive months. *Id.*

35. *Time for filing lien notice.*—Where the work has been continuous the statutory notice is good if filed within the statutory period after the last work, although the work has been going on under sundry successive contracts. *Id.*

36. *Mechanic's lien against oil well.*—One who contracts to drill an oil well and to furnish the tools, ropes, fuel, etc., to be used in the drilling, can file a mechanic's lien against the well for the work so done and the materials furnished, under the provisions of the second section of the act of March 7, 1873. *Vandergrift and Forman's Appeal*, 397

37. *No lien for hauling quartz.*—A mechanic's lien will not lie for hauling ores from a mine to a quartz mill. The statute contemplates a lien only for such labor or material as may have been performed or furnished in the development, improvement or conservation of the mine, which has become incorporated with and constitutes a part of its value. *Barnard* v. *McKenzie*, 403

38. *Equitable construction.*—Notwithstanding the mechanic's lien was unknown to the common law, yet in view of the equitable character of the statute, it should be liberally construed, but can not, by construction, be extended to cases not provided by the statute. *Id.*

39. *Proceedings strictly statutory.*—The proceeding to enforce a mechanic's lien is purely statutory, and the court has no authority to enter up a decree for a part of the claim, independent of the petitioner's right to a lien. *Id.*

40. *Jurisdiction of county courts.*—The extent of the jurisdiction of the county courts as to their pecuniary limit in suits to enforce lien claims, is to be measured by the amount involved in each claim severally, and not the aggregate of all the claims presented against the same property. Where no one claim exceeds $2,000 in amount, any number of claims may be adjudicated in the same proceeding. *Keystone M. Co.* v. *Gallagher*, 406

41. *Lien relates to date of first item.*—The legal effect of the latter clause of section seven of the act of 1872, is to give the mechanic, laborer

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LIEN. *Continued.*

or material man, a lien from the date of the *commencement* of the labor or the furnishing of the materials. *Id.*

42. *Improvements feed the lien.*—A house built for the use of the mine and being part of the mining property, may be sold with the mine for the purpose of enforcing a lien under the statute. *Id.*

43. *Powder, steel and candles,* furnished for the use of the mine, *held,* to be clearly within the meaning of the statute, and materials for which a lien may be enforced. *Id.*

44. *Service by publication.*—Want of *personal* service and the non-appearance of a defendant, in an action to enforce a lien claim, will not vitiate a decree against such defendant, although before the commencement of the suit he had parted with his interest. *Id.*

45. *Manner of sale.*—The statute provides that the premises may be sold within the time and in the manner provided for sales on execution issuing out of any court of record. *Id.*

46. *Lien of superintendent.*—The general superintendent of a mining company is a laborer within the intent and meaning of the Miner's Lien Law. *Cullins* v. *Flagstaff M. Co.*, 412

47. *Scope of the lien law.*—The Mechanics' Lien Law is not intended for the poorer class of laborers only, but is for the benefit of all persons who can bring themselves within its provisions. *Id.*

48. *Facts of the case.*—A was employed by a corporation to direct the work in its mine, with authority to employ and discharge miners, and procure and purchase supplies. It was also his duty to plan, oversee and direct the work in said mine, direct the shipment of ore, and generally to control the actual working and development of the same. *Held,* that he was entitled to a mechanic's lien. *Id.*

49. *Work on house and tunnel on same claim.*—Where work has been performed upon a dwelling house situate upon a certain mining claim, and upon a tunnel and other portions of the same claim, it is work done upon the same piece of property, and does not come within the terms of the Code, section 1188, requiring work to be apportioned where done on two or more separate parcels. *Dickenson* v. *Bolyer*, 415

50. *Lien of laborers against insolvent corporations.*—Under the act providing a special lien for laborers, in cases where corporations become insolvent, the lien comes into existence as of the date which the court fixes to be the time when the insolvency occurred, and applies only to laborers at that time in their employ, and does not cover an outstanding unpaid claim for labor by a former employe. *Del. L. & W. R. R. Co.* v. *Oxford Iron Co.*, 417

51. *The presentation of a claim embracing items* other than charges for wages, does not work a forfeiture of the right of lien for the wages given by the statute. *Id.*

52. *Lien covers old debts for wages.*—The laborers in the employ of a corporation, at the time of its insolvency, have a lien upon the assets thereof for the whole amount of wages due to them, respectively, no matter how long before the date of insolvency the wages may have accrued. *Id.*

53. *The acceptance of a promissory note,* without security, does not

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LIEN. *Continued.*

operate as a waiver of the lien given by the statute, unless an intention to relinquish such right is unmistakably manifested. *Id.*

54. *Proving claim in excess.*—The proving of a claim for a sum in excess of the amount really due does not work a forfeiture of the right to the lien. *Id.*

See INTEREST, 1; MORTGAGE, 1.

LOCATION.

1. *First discoverer neglecting to locate.*—Where a lode has been discovered, and a location attempted by the discoverer, and the same vein is afterward entered upon by others and an adverse location attempted, such later parties, if they comply with the law, and the discoverers have failed to comply, have an exclusive right, no matter who is entitled to the credit of discovery. *Gleeson* v. *Martin White Co.*, 429

2. *Relation of vein to location.*—It is true that the vein is the principal thing and the surface only an incident thereto, but the location is of *a piece of land* including the vein. *Id.*

3. *Reasonable time to trace vein.*—The locator has a reasonable time to trace his vein before he is bound to perfect his location by fixing his bounds on the surface, but the location is never complete till this is done. *Id.*

4. *Change in system of location.*—The custom long prevailed on the Pacific slope to locate a single vein by means of a notice posted on the croppings without any definition of boundaries, and to follow the vein wherever it ran to the extent of the feet claimed; the act of May 10, 1872, has changed all that. The location now is of *a piece of land* with all the veins it may contain. *Id.*

5. *Staking the discovery and center line, sufficient.*—The discoverers of the Paymaster lode placed a monument and notice at the point of discovery, and placed a stake at each end of the claim on the center line marked with the name of the lode, and so as to show on each stake which end of the claim it purported to mark, and these stakes were on the line of the croppings. *Held*, a sufficient marking of the boundaries under the act of May 10, 1872. *Id.*

6. *Location of mining, over tailings claim.*—A party may locate a claim for mining purposes upon ground already claimed for fluming purposes, and the locations will not conflict; but it does not follow that a claim already located for mining purposes can be located or used as a place of deposit for tailings. When the location for fluming purposes is prior, the mining right will be subject to the prior right of deposit. *O'Keiffe* v. *Cunningham*, 451

7. *Implied limit to size of claim—General usage.*—When there is no regulation limiting the size of a claim there is nevertheless an implied limit. No location can be so extended as to amount to a monopoly, and in the absence of local regulations prescribing a limit, resort must be had to general usage. *Table Mountain Co.* v. *Stranahan*, 457

8. *Presumption of assent to use of name.*—A party in whose name a location of a mining claim is made is presumed, *prima facie*, to assent to the same. *Van Valkenburg* v. *Huff*, 467

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LOCATION. *Continued.*

9. *The locator named is owner.*—If A in locating use the name of B, he can not sue for the claim in his own name; his position is that of servant to the owner, and his possession the possession of the owner, and he could only acquire an independent right by relocating in his own name. *Id.*

10. *Location and development contract construed.*—Savage and Carmack, in 1859, located a lode claim for themselves and four others, among them the plaintiff, who knew nothing of the use of his name. Five days afterward they agreed with certain prospectors to have the claim opened to "pay," the prospectors to have a half interest. This agreement, drawn up in the names of all the locators as vendors, was signed by only two of them—the two who located the claim. These prospectors expended large sums, made costly improvements and developed a valuable mine, the plaintiff meanwhile giving no notice of his claim. *Held*, that when the location was recorded, all the persons named as locators became tenants in common, and that one could not convey or incumber the interest of another. 2. That only those who signed the contract were bound. 3. That the prospectors had no defense as against plaintiff's claim under the location. 4. That these rulings amounted to "flagrant injustice" but were compelled by "the clear rules of law." *Chase* v. *Savage S. M. Co.*, 476

11. *Purchaser may perfect title.*—When a discoverer conveys a claim to a third party before such discoverer has completed his location, the purchaser is bound to do the acts required to complete the location within the same time to which his grantor was limited. *Zeckendorf* v. *Hutchison*, 483

12. *Acts of location must be stated.*—The conditions precedent to the acquiring of a title to mineral claims, upon bill for injunction to restrain trespass thereon, must be stated; they will not be presumed. *Id.*

13. *Location by miners before passage of statute.*—Before any law was enacted by the territorial assembly, regulating the manner of locating and conveying mining claims on the public domain, that matter was regulated solely by rules or by-laws made by the inhabitants of the district in which the claim was situate, or in the absence of such rules and by-laws, by the local customs and usages of the district. *Sullivan* v. *Hense*, 487

14. *Application of the rule.*—In the year 1860, a valid location of a mining claim on the public domain could be made only according to the rules, usages and customs of miners in the district where such claim was situate. *Id.*

15. *Plaintiff must prove location.*—Plaintiffs in ejectment, who seek to recover a mining claim upon their paper title, there being nothing to show that they or their grantors were ever in possession, must prove a valid location of the claim according to the rules of the district prevailing at the time such location was made. *Id.*

16. *As to length of claims by district record.*—In the absence of better evidence, the rule or custom of a mining district as to the length of claims located in the district may be proved by the uniform usage of recording a certain number of feet. *Id.*

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LOCATION. *Continued.*

17. *Insufficient marking of boundaries.*—The posting of a notice of claim on a tree at each end of a claim is not a compliance with § 2324, U. S. Revised Statutes, requiring a location to be distinctly marked upon the ground so that its boundaries can be readily traced. *Holland* v. *Mount Auburn M. Co.*, 497

18. *Boundaries must be marked.*—Since the passage of the Mining Act of May 10, 1872, a claimant must distinctly mark his location upon the ground so that the boundaries can be readily traced. *Gelcich* v. *Moriarty*, 498

19. *"Single vein" under old law; "all veins" under act of 1872.*—Under the law prior to May 10, 1872, each locator was entitled to but one vein, whereas under the act of Congress of May 10, 1872, he is entitled to all veins having the top or apex within his surface lines. *Blake* v. *Butte S. M. Co.*, 503

20. *"Location" includes surface.*—The notice of location is presumed to refer to the surface ground, as well as to the vein or lode located, and if the latter is held by the notice of "location," such location must be along the general course or strike of the vein. *McCormick* v. *Varnes*, 506

21. *Claim to vein limited by surface lines.*—It is clear that the government did not intend, by the act of Congress of July 26, 1866, to authorize the miner to locate, or itself to grant, two separate and distinct estates in a mining location, one in the surface ground, and the other in the vein or lode, whenever the latter might be found to run in its course, without regard to the surface ground. *Id.*

22. *Vein can be followed beyond, only on its dip.*—Under the provisions of sections 2 and 4 of the act of Congress of July 26, 1866, the right to follow a vein claimed under a mining location, is expressly confined to *depth*, and such act can not, by any fair construction, be made to apply to the strike or course of the vein. *Id.*

23. *Location must follow the strike.*—The location of a mining claim should be made along the course of the vein or lode, so as to include the same within its boundaries; otherwise it will only secure so much of the lode or vein as it actually covers. *Id.*

24. *Marking corners and center lines.*—Stakes and stone monuments set at each corner of the claim and at the center of each end line, is a sufficient marking of the boundaries under the most stringent construction of the act of Congress. *Southern M. Co.* v. *Europa M. Co.*, 513

25. *Essential requirements in location.*—When under district rules it is required that the boundaries be marked with a ditch, and that stakes be placed at the corners, and these regulations are not complied with, no valid location is made. *Myers* v. *Spooner*, 519

26. *Actual possession without valid location.*—Where a party is in possession of a mining claim, claiming title under a conveyance by specific bounds, and is engaged in actually working the same within his lines as marked on the ground, a party entering upon such prior right is a trespasser, and can gain no right as against the possessor; he can not initiate a pre-emption or other title by a trespass. *North Noonday Mining Co.* v. *Orient Co.*, 524

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LOCATION. *Continued.*

27. *Side veins within the lines—Top or apex.*— The locator of a lode claim is entitled not only to the vein discovered but to every other vein throughout its entire depth, the top or apex of which lies within his surface lines extended downward vertically. *Id.*, 530

28. *Marking boundaries.*—A location must be distinctly marked on the ground so that *its boundaries can be readily traced.* Any marking on the ground claimed, by stakes and monuments and written notices, whereby the boundaries of the claim located can be readily traced, is sufficient. *Id.*

29. *Sufficient marking, by end stakes and notices.*—The marking of the center line of the claim by a prominent stake or monument at each end, with a written notice on one or both, claiming from stake to stake, with a specified number of feet in width on each side of the line, is a sufficient compliance with the law. *Id.*

30. *Location perfected before adverse claim exists.*—A subsequent locator has no right to object to a location as not sufficiently marked at the time of its location, or before recording, *provided* it was sufficiently marked before any rights had accrued to such subsequent locator. *Id.*

31. *The natural objects and permanent monuments* need not be on the ground located, although they may be. The natural object may consist of any fixed natural object, and a permanent monument may consist of a prominent post or stake firmly planted in the ground, or a shaft sunk in the ground. *Id.*

32. *Identifying claim.*—Whether the record calls were sufficient to identify the claim—*submitted* as a question of fact for the jury. *Id.*

33. *It is an elementary rule that no man may profit by his own wrong*, and he that prevents the doing of a thing may not complain of its non-performance. *Miller* v. *Taylor*, 547

34. *Discoverer adopting location of his ejector.*—A discoverer wrongfully ousted by a wrongdoer, may adopt as his own the survey and location perfected by the party who drove him out of the possession. *Id.*

35. *What a mining location covers—Apex—Dip—Lode in place.*—The law provides that upon a location properly made the claimant shall have the vein upon which the location is made, and all other veins and lodes having their top or apex within the lines of the location; and not only within the body of the claim within the lines of the location, but beyond those lines as far as the vein or lode may, in its descent into the earth, pass beyond those lines and within the end lines of the location. But such vein or lode must be *in place. Iron Silver M. Co.* v. *Cheeseman*, 552

36. *Res gestæ—Declarations of locator.*—The declarations of the locator of a mine made long after the time of the location are not of the *res gestæ;* declarations to be *res gestæ* must be part of an act, or made while such act was being performed. *Kramer* v. *Settle*, 561

37. *Manner of location* under Idaho statutes considered. *Id.*

38. *Prior location must file adverse claim.*—Under the Mining Act of 1872, where one is seeking a patent for his mining location, and gives the prescribed notice, any other claimant of an unpatented location objecting to the patent on account of extent, or form, or because of asserted prior

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LOCATION. *Continued.*

location, must come forward with his objections and present them, or he will be afterward precluded from objecting to the issue of the patent. *Eureka M. Co.* v. *Richmond M. Co.*, 578

39. *End lines.*—The provision of the act of 1872, requiring the end lines to be parallel, is directory merely. "End lines," though not named in the act of 1866, are necessarily implied. *Id.*

40. *Location failing to cover the lode.*—A location of a mining claim, upon a lode or vein of ore, should be laid along the same lengthwise of the course of its apex at or near the surface, as well under the Mining Act of 1866 as under that of 1872. If located otherwise, the location will only secure so much of the lode or vein as it actually covers. *Flagstaff M. Co.* v. *Tarbet*, 607

41. *If a location be laid crosswise of a lode* or vein, so that its greatest length crosses the same instead of following the course thereof, it will secure only so much of the vein as it actually crosses at the surface, and the side lines of the location will become the end lines thereof, for the purpose of defining the rights of the owners. *Id.*

42. *Old locations entitled to the side veins.*—Section three of the Mining Act of May 10, 1872, recognizes, as valid, locations of mining claims made prior to its passage, and confirms the locators thereof in the exclusive possession of all the lodes which have their apex within the surface lines of such mining claims. *Mount Diablo M. Co.* v. *Callison*, 616

See ALIEN; APEX; BOUNDARIES, 1, 2; CORPORATIONS, 2; DIP, 1, 2; DISCOVERY; INJUNCTION, 2; LOCATION CERTIFICATE; LODE; MISTAKE, 2; PATENT, 1–5; RECORD.

LOCATION CERTIFICATE.

1. *Immateriality of the location notice*, except during the period pending the completion of the staking and record, considered. *Gleeson* v. *Martin White Co.*, 429

2. *The location notice* need not contain a description of the claim by reference to natural objects or permanent monuments; that is required only in the record. *Id.*

3. *Location notice—When contents may be shown.*—Where, to prove the priority of their possession of a mining claim, plaintiffs relied upon a notice which had been posted on a tree on the claim, and produced a witness who swore to having often seen the notice, and that when last seen it was part torn and the rest illegible. *Held*, that this was sufficient proof to let in parol evidence of its contents, and that stricter proof in this class of cases should not be required. *Dunning* v. *Rankin*, 455

4. *Certificate not conclusive.*—The certificate of location required to be made by the probate judge (under the New Mexico statute), is not conclusive evidence of a compliance, by the locators, with the requirements of the law. No act done in a mere ministerial capacity can be conclusive evidence. *Zeckendorf* v. *Hutchison*, 483

5. *Location notice, no marking of boundaries.*—A location notice placed on the center of the claim and calling for a definite length and width: *Held*, not a compliance with such act requiring the marking of boundaries. *Gelcich* v. *Moriarty*, 498

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LOCATION CERTIFICATE. *Continued.*

6. *Indefinite description in location certificate.*—A location certificate which describes a lode claim as situate "on the north side of Iowa Gulch about timber line on the west side of Bald Mountain * * * staked and marked as the law directs," *held* void for uncertainty and not a compliance with § 2324 U. S. Revised Statutes, requiring a reference to some natural object or permanent monument. *Faxon* v. *Barnard*, 515

7. *Record not stating length of claim.*—The record of a lode claim not stating the number of feet claimed is admissible in evidence and is a compliance with the statute requiring a record to be made, and with the customary form in which they have been made. *Conner* v. *McPhee*, 571

8. *Insufficient proof to admit copy—Original location certificate absent at land office.*—Plaintiff offered in evidence a paper purporting to be the original declaratory statement (location certificate) of his lode, signed by the discoverer and sworn to before William Peck, recorder—and rested. Defendant produced one William Peck who swore that the signature to the jurat was not his signature. Plaintiff then proved that his original statement was at the U. S. land office, and offered a certified copy from the county recorder's office. *Held*, that no sufficient excuse for not producing the original was shown: (2) that the copy was not admissible, and (3) (*obiter*) that if the paper was required in the land office on application for patent, a certified copy from that office should have been produced. *Stapleton* v. *Pease*, 574

9. *Surprise.*—A party can not claim surprise at an attack upon a paper as *not* the original where he is shown to have known of the existence and whereabouts of another paper which was in fact the original. *Id.*

10. *The identity of persons* is always presumed from the identity of names. *Id.*

See LOCATION; MISTAKE, 2; RECORD.

LODE.

1. *Right to follow unpatented vein into patented ground.*—The owner of a vein located prior to May 10, 1872, and who was in the possession thereof at such date, has the right to follow his vein within the patented surface ground of another. *Blake* v. *Butte M. Co.*, 503

2. *Power to limit width of lode claim.*—By implication the act of May 10, 1872, confers upon the miners the right to limit the width of a lode claim by (district) rule. *North Noonday Co.* v. *Orient Co.*, 529

3. *Vein or lode defined.*—A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz or with some other kind of rock in place, carrying gold, silver or other valuable mineral deposits named in the statute. Its status as a vein is not affected by its being large or small, rich or poor; if it be a vein discovered, a location may be made upon it. *Id.*

4. *Vein, lode or ledge, defined—Existence of, a question of fact.*—*Vein, lode and ledge* are the words used in the statute to designate a mineral deposit in rock, and are supposed to be nearly synonymous in meaning. A vein or lode is a body of mineral or mineral-bearing rock within defined boundaries in the general mass of the mountain. The existence of such vein or lode is a question of fact to be found by the jury

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LODE. *Continued.*

from the evidence before them. *Iron Silver M. Co.* v. *Cheeseman*, 552

5. *Continuity of ore body—Lode not "in place."*—If the ore body is continuous, to the extent that it may maintain that character, it is in place—whether deposited in that form, or moved to its position bodily with its inclosing walls. Whether the vein is thick or thin is not material, so it is continuous. But if the territory is so broken up, jumbled and mixed, the several parts together, that there is nothing continuous, there is no lode *in place*. *Id.*

6. *Lode defined.*—The mining acts of Congress do not define the term lode. As there used, the term is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. It includes all deposits of mineral matter found through a mineralized zone or belt coming from the same source, impressed with the same forms, and appearing to have been created by the same process. *Eureka M. Co.* v. *Richmond Co.*, 578

7. *Scientific definition.*—The definition of a lode given by geologists is that of a fissure in the earth's crust filled with mineralized matter, or more accurately, as aggregations of mineral matter containing ores, in fissures. *Id.*

8. *Slide quartz from the ledge.*—The locator of a quartz lode is not confined simply to the solid quartz in place, but is entitled to the loose quartz rock and decomposed material containing gold, which was once a part of the lode, and is now detached, so far as the general formation of the ledge can be traced. *Brown* v. *'45 and '49 M. Co.*, 600

9. *Idem.*—But this right could not be extended to cover free gold at a distance of several hundred feet although such gold might be proved to have originally come from the ledge above. *Id.*

10. *Width of lode claim.*—The statute of Montana, of 1864, allowed to a locator 200 feet in length along the lode discovered: "also fifty feet on each side of said" lode for working purposes. *Held*, that the measurement of the width of the claim should be from the walls of the lode so as to make the width of the claim include the width of the lode, with fifty feet additional on each side. *Foote* v. *National M. Co.*, 605

11. *Right to follow dip—Effect of end lines.*—Each locator is entitled to follow the dip of the lode or vein to an indefinite depth, though it carries him outside of the side lines of the location; but this right is based on the hypothesis that the side lines substantially correspond with the course of the lode or vein at the surface, and it is bounded at each end by the end lines of the location, crossing the lode or vein, and extended perpendicularly downward and indefinitely in their own direction. *Flagstaff M. Co.* v. *Tarbet*, 607

12. *In place—Superficial deposit—Dip.*—Ore, with no other covering than the superficial debris is not a lode *in place*. such as may be followed beyond the side lines of its location. *Tabor* v. *Dexter*, 614

13. *Vein and lode defined—The "country" distinguished from the vein.*—Metaliferous rock in place, not in a fissure, may be found under such conditions within clearly defined boundaries as to require recognition as a vein or lode (as in the *Eureka case*), but a broad metaliferous

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LODE. *Continued.*

zone having within its limits true fissure veins plainly bounded, can not be regarded as a single vein or lode, although such zone may itself have boundaries which can be traced. *Mount Diablo Co.* v. *Callison*, 616

14. *A locator is entitled to the width prescribed by the district rule* for all lode claims, without specifying the number of feet in width in his location notice. *Id.*

15. *If it were held necessary to fix the width* in the notice, a claim in such notice for "all the privileges granted by the laws" of the mining district would fulfill the requirement. *Id.*

16. *Division line must be protracted to extend as far as the dip extends.* —E. and R., two mining companies, in settlement of the differences between them respecting the possession of certain ground and ores therein contained, entered into an agreement establishing between specified points on the earth's surface a boundary line between their respective claims, and stipulating that E. would convey to R. all the mining ground and claim lying northwesterly of said line, including "all veins, lodes, ledges, deposits, dips, spurs and angles on, in, or under the same contained," and that R. would convey to E. all its right, title and interest in and to any and all the land or mining ground situated on the southeasterly side of said line, and in and to "all ores, precious metals, veins, lodes, ledges, deposits, dips, spurs and angles on, in, or under the said land or mineral ground." The agreement further declared that it was the object and intention of the parties to confine the workings of R. "to the northwesterly side of said line continued downward to the center of the earth." *Held*, that the agreement must be construed as protracting the boundary line through the dips of the veins or lodes wherever they may go in their course toward the center of the earth. *Richmond M. Co.* v. *Eureka M. Co.*, 634

See APPROPRIATION, 1; ASSAY, 1; DIP; DISCOVERY; ESTOPPEL, 1; LOCATION; PATENT, 1–5.

LUNATIC.

1. *Contract approved for working lunatic's coal.*—Agreement by the committee of a lunatic, that coal under the lunatic's estate should be worked by the owner of the adjoining land, established, under the circumstances. *Tabbart, ex parte*, 643

2. *Agreement for benefit of lunatic affirmed in chancery—Lease of minerals for a gross sum treated as a sale and conversion of the realty.* —A, B and C were tenants in common, in fee. C became of unsound mind. A and B sold part of the land and conveyed their shares to a purchaser. They also granted a lease of the minerals under other parts in consideration of a gross sum payable by installments within a limited time. They also covenanted that C should concur, and that they would hold her share of the minerals in trust for her.

B afterward became also of unsound mind, and A sold other parts of the land and made like leases of minerals for like consideration, covenanting that B and C should concur, and that he would hold their share of the moneys payable, in trust for them. B and C were both found lunatic by

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LUNATIC. *Continued.*

inquisition, and the court confirmed the sales and leases and ordered the committee to execute the deeds.

C died leaving B her heir at law and sole next of kin. Afterward B died also: *Held*, that the leases were in the nature of absolute sales of real estate; that the confirmation of the sales and leases were sales under the 124th section of the Lunacy Regulation Act of 1853, and that as between the real and personal representatives of B, the proceeds, both of the sales and the leases, effected after B became of unsound mind, belonged to her heir at law as real estate; but that as to the shares both of B and C in the proceeds of the sale and lease in which B concurred, they were converted into personalty and belonged to B's next of kin. *In re Mary Smith* 650

MANDAMUS.

1. *Remedy by appeal.*—The remedy of the plaintiff, *if there was error in the order modifying the injunction*, is by appeal; but he can not have a mandamus to compel the issuance of attachment for contempt. *Fremont* v. *Merced M. Co.*, 659

2. *Remedy at law.*—Mandamus is not the proper remedy where the relator has a plain, speedy and adequate remedy at law. *State* v. *Guerrero*, 660

3. *Where relator claims that he is entitled to stock certificates* which the trustees refuse to issue to him, he has his action against the corporation for the value of the stock, and mandamus will not be allowed. *Id.*

4. *Where there are sundry claimants* to stock, a mandamus ought not to be granted to compel its issue to any one of them. *Id.*

MAPS.

1. *The necessity of maps* in review of mining evidence, indicated. *Van Valkenburg* v. *Huff*, 467

MARRIED WOMEN.

1. *Estoppel against feme covert.*—The wife will be assumed to have consented when her knowledge is shown. *Harkness* v. *Burton*, 318

2. *Husband signing wife's name without authority.*—A man, by signing his wife's name to articles of association without any authority from her, does not thereby make her a member of the association, nor is she thereby rendered liable for the value of services, afterward rendered at the instance of the association by a person in examining mines. *Boyd* v. *Merriell*, 664

3. *Parties omitted in suit against association.*—The name of a woman signed to articles of association without authority may properly be omitted in a suit against the members of the association for services. *Id.*

4. *Conveyance to married woman without consideration.*—One G., at the instigation of the owners, executed a conveyance to the plaintiff of certain "gold claims," belonging (it would seem) to the plaintiff's husband and the defendant; but plaintiff paid no consideration for the conveyance, and it was executed without her knowledge, and never delivered to her; and no mention of any trust was made therein. Afterward she joined with her husband in conveying said "claims" to a third person, and

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MARRIED WOMEN. *Continued.*

a large part of the proceeds of the sale to such grantee was placed to her credit and drawn out by her on her own checks. She had no knowledge that defendant had any interest in said claims, and probably supposed that they belonged to her husband. *Held*, that she was not liable to defendant as a trustee for him. *Bonesteel* v. *Bonesteel*, 667

5. *Note to married woman void for want of consideration.*—The proceeds of "claims" being in plaintiff's hands, but in fact entirely under her husband's control, defendant received from the husband a part of said proceeds as an advance upon his (defendant's) interest therein. He had no negotiations with plaintiff in regard thereto, and did not know that she claimed the money as a part of her separate estate. *Held*, that the transaction could not be regarded as a loan from plaintiff to him, and that a note subsequently given by him to her for the amount, was void for want of consideration. *Id.*

6. *Contract between husband and wife.*—A contract, in which a husband agrees to perform services for his wife and two other persons, and a judgment obtained thereon, are both void at common law as between husband and wife; and if such a contract is authorized by statute, the strict letter of the statute must be followed. *Isaacs* v. *McAndrew*, 690

See HOMESTEAD, 1.

MASTER AND SERVANT.

1. *Delivery to servant of assayer.*—Delivery to apprentice is delivery to the master, and trover lies after demand in such case. *Mead* v. *Hamond*, 672

2. *No action lies against a steward*, manager or agent, for damage done by the negligence of those employed by him in the service of his principal, but only the principal, or those actually employed, are liable. *Stone* v. *Cartwright*, 672

3. *Master liable where he becomes a workman.*—The principle that a servant sustaining an injury from the negligence of a fellow servant, while engaged in the common employment, can not recover in an action against the common master, does not exempt from liability a master who himself takes part in the servant's work, and while so doing injures the servant through negligence. *Ashworth* v. *Stanwix*, 674

4. *Negligence of owner acting as manager—Injury from falling scale.*—Declaration stated that defendants were owners of a coal mine, and plaintiff was employed by defendants as a collier; that in the course of his employment it was necessary for him to descend and ascend through a shaft constructed by defendants; that by the negligence of defendants the shaft was constructed unsafely, and was, by reason of not being sufficiently lined or cased, in an unsafe condition, which defendants well knew; and by reason of the premises, and also by reason, as defendants well knew, of no sufficient or proper apparatus having been provided by defendants to protect plaintiff from injuries arising from the unsafe state of the shaft, a stone fell from the side of the shaft on the head of the plaintiff, and he was dangerously wounded. Plea, not guilty. At the trial it was proved that S., one of the two defendants, was manager of the mine, and that it was worked under his personal superintendence, and that the

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MASTER AND SERVANT. *Continued.*

plaintiff was not aware of the state of the shaft. The jury found that the defendants were guilty of personal negligence: *Held*,

On motion to enter a nonsuit, that on this finding of the jury S. was liable, and therefore the other defendant was liable also.

On motion in arrest of judgment, that the declaration must be taken to allege personal knowledge in the defendants of the state of the shaft, and therefore the action was maintainable. *Mellors* v. *Shaw*, 678

5. *Scale—Negligence of underlooker.*—The plaintiff, a workman in a coal mine of the defendants, received damage from the fall of a scale from the roof which had lost its support by reason of the removal of the coal below in the ordinary course of working. The defendants' underlooker, whose duty it was to superintend the mining operations, had negligently, though the danger had been pointed out to him, omitted to prop up the roof. The removal of the coal and the propping up of the roof ought, in the exercise of due care, to be nearly contemporaneous operations. *Held*, that as there was no evidence that the defendants had not exercised due care in the selection of their underlooker, nor in putting the mine into a proper condition before the miners were sent into it, they were not answerable for the injury caused to the plaintiff by the negligence of the underlooker, his fellow laborer. *Hall* v. *Johnson*, 684

6. *Injury to servant through negligence of master—Spliced rope.*—An employe in a coal mine, while descending the shaft in a cage, was precipitated to the bottom, a distance of thirty-five or forty feet, by the breaking of the rope by which the cage was let down, and was seriously injured. Several months prior to the injury, the rope being old and in bad condition was spliced, and a few weeks before the accident was again spliced. The employer was at that time informed that the rope was unsafe. The injured man had been employed at the mine only about twenty days when the accident occurred; and one witness testified that he told him he would be injured if he worked in the mine. The condition of the rope could not be seen by ordinary observation. *Held*, that the use of the rope in its unsafe condition was gross negligence in the employer, and that he must answer in damages for the consequences. *Perry* v. *Ricketts*, 687

7. *Idem—Notice of defect by employe, when not required.*—It was not incumbent on the employe, under the circumstances, to notify his employer of the defect, which the former had but slight opportunity of knowing, and notice of which had already been given to the latter. *Id.*

8. *Contract for services—Time of payment.*—A written contract for five years' services as superintendent of mines, at the rate of $4,000 per year, to be paid as part of the business expenses of the enterprise, in which no time of payment is fixed, is an entire contract, and performance of the work for the whole period is a condition precedent to the right to sue for the hire. *Isaacs* v. *McAndrew*, 690

9. *Contract for superintendent's expenses construed.*—An agreement that the traveling and living expenses of the superintendent of a mine shall be a charge upon the business and property of the enterprise, creates no right on the part of the superintendent to proceed against his employ-

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MASTER AND SERVANT. *Continued.*

ers before an attempt is made to exhaust the remedy against the property itself. *Id.*

10. *Interest on money expended by superintendent.*—A claim of interest on money laid out and expended by the superintendent of mines will only be allowed under the Montana statutes when it is averred and proved that there has been unreasonable and vexatious delay. *Id.*

11. *Quitting before expiration of year.*—The finding of a jury that a party has performed services as superintendent of mines in Montana for a year, under contract, will be set aside if the evidence shows that he left the Territory before the year expired. *Id.*

See PARTNERSHIP, 7.

MEASURE OF DAMAGES.

1. *Measure of damages against lessor mining leased ground.*—A landlord entering upon ground held under lease from his grantor, but without willful wrong or gross neglect on his part, is liable for the value of the mineral he has taken out, less rent and cost of mining, with interest. *Chamberlain* v. *Collinson*, 37

2. *Lessee passing bounds by mistake—Measure of damages.*—Where the lessor not only gives his tenant the power, but makes it his duty to explore and mark a theoretical line upon his own premises, the tenant can not be treated as a trespasser if, in an honest attempt to ascertain the line, he should chance to pass over it; for the right to do what is necessary in order to find and fix the line is implied in the grant by which it is made a boundary, and in such a case the lessor can only recover damages for improper mining or criminal negligence. *Freck* v. *Locust Mountain Co.*, 57

3. *Measure of damages for trespass in mining coal.*—In an action for trespass in mining and carrying away coal, if it appears that the act of the defendant was not willful or grossly negligent, the measure of damages is the value of the coal at the mouth of the pit, less the cost of severing it and raising it. *Austin* v. *Huntsville M. Co.*, 115

4. *Punitive damages.*—In an action for a libel, if there is no proof of malice or ill will toward plaintiff, and the publication is made in the usual course of defendant's business as public journalist, in the full belief that the article was true, after a careful inquiry from an apparently reliable source, the plaintiff is not entitled to punitive damages. *Wilson* v. *Fitch*, 156

MISTAKE.

1. *Secured claim in bankruptcy.*—When a creditor, in ignorance of his rights, has proved a secured claim as unsecured, he will be allowed to amend by setting up his security. *In re Hope M. Co.*, 364

2. *Effect of mistake of recorder—Acts of location operate as notice.*—It appeared on the trial that the district recorder, in recording the notice of one of the defendants' claims, omitted by mistake one of the lines, but in fact the lines were distinctly marked on the ground, as required by the mining rules. *Held*, that the defendants were not bound by the mistake of the recorder, and that the actual location on the ground was sufficient to impart notice to all comers. *Myers* v. *Spooner*, 520

See RECORD, 2.

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MORTGAGE.

1. *Miner's lien and intervening mortgage.*—Where a miner has been hired for a month and continues to labor under the original hiring from month to month, his lien is subservient to an intervening mortgage from the end of the current month during which the mortgage was filed for record. *Capron* v. *Strout*, 391

See FIXTURES, 2.

NEGLIGENCE—See MASTER AND SERVANT.

NEW TRIAL—See PLEADING AND PRACTICE, 12.

NONSUIT.

1. *Nonsuit forced by erroneous rulings.*—A plaintiff may move to set aside a nonsuit to which he had assented, when driven thereto by rulings of the court making it apparent that he could not recover. *Conner* v. *McPhee*, 570

NOTICE.

1. *Mining, as notice.*—Where parties have notice by the work done they will be charged with notice of all rights which the parties held who prosecuted the same. *Harkness* v. *Burton*, 318

See ABANDONMENT, 5; LEASE, 29; LOCATION CERTIFICATE; MISTAKE, 2; POSSESSION, 1.

OIL.

1. *Oil considered as a mineral fluid.*—Oil, like water, is not the subject of property, except in actual occupancy. A grant of water is not the grant of the soil on which it rests, and it passes nothing for which ejectment will lie. *Dark* v. *Johnston*, 283

See LIEN, 36; TIME, 1.

ORE—See LICENSE, 40; LIEN, 1, 13, 37.

PARTITION—See ATTORNEY AT LAW, 1.

PARTNERSHIP.

1. *Tenants in common of a mine, working it together* and dividing the profits in proportion to their interests, are mining partners. *Nolan* v. *Lovelock*, 360

2. *Each mining partner has authority to hire labor* and to bind the firm for its payment. *Id.*

3. *Secret agreement limiting power of partnership.*—If there be an agreement among a firm of mining partners that no member should hire workmen or contract for necessaries without consent of the others, notice of such agreement must be brought home to the party hired or contracted with. *Id.*

4. *The power of a majority* to contract the claim considered. *Id.*

5. *In a suit against partners* an item of debt due by the defendants and others jointly, can not be recovered. *Id.*

6. *Joint liability of individual and association.*—If an individual is employed by an association to examine mines, a person who acts with the association, though his name is not signed to the articles of association, may become jointly bound with the members for such services. *Boyd* v. *Merriell*, 664

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PARTNERSHIP. *Continued.*

7. *One partner liable, all liable.*—If the master is a member of a partnership by whom the servant is employed, and the work in which he so takes part is within the scope of the common undertaking of the partnership, his co-partners are jointly liable with him for the injury thus caused to the servant by his negligence. *Ashworth* v. *Stanwix*, 674

See LIEN, 2.

PATENT.

1. *A patent of a mining claim based upon a location made under the act of 1866*, grants the government title to the surface ground mentioned therein, subject to the right of other locators to follow any other vein or lode legally held under locations made prior to the act of May 10, 1872. *Blake* v. *Butte Silver M. Co.*, 503

2. *Senior patent on junior location.*—The holder of an elder location failing to adverse the application for patent made by the holder of a junior location, waives his priority. And, if he ever afterward apply for patent, his patent is subject and junior to the patent issued on the prior application. *Eureka Co.* v. *Richmond Co.*, 578

3. *The patent of the United States* "is something upon which its holder can rely for peace and security." The presumption is that it was duly issued, and in ejectment mere surmises to the contrary will not be listened to. *Id.*

4. *Effect of end lines.*—The holder of a patent can not claim any part of the vein on its strike beyond his end line, extended vertically downward. *Id.*

5. *Idem—Necessity of this construction.*—The limitation of a claim on a lode to a certain number of feet in length *ipso facto* confines the claimant to that part of the lode lying within such end lines and within vertical planes drawn downward through such end lines, or such end line extended. No other mode of division would carry out the limitation. A patented claim is limited or bounded in the same way by the mining acts in terms. The lode can not be followed beyond a vertical plane drawn downward through the end lines, or through the end lines extended to cover the dip. *Id.*

See LODE, 1; RELATION, 1; RIPARIAN RIGHTS, 1.

PERSONAL PROPERTY.

1. *Chattels real.*—The case of *Martin* v. *Mathiot*, 14 S. & R. 214, distinguished, the property in that case consisting of chattels personal and, in this of chattels real. *Christie's Appeal*, 42

See LEASE, 4, 30.

PLEADING AND PRACTICE.

1. *Reversal for error on points of evidence.*—The appellate court will not usually reverse for error in the exclusion of proper or reception of improper evidence by the court below, unless it can be seen from the record that such evidence was relevant (material), and that the party complaining may have been injured by the ruling. *Bowyer* v. *Seymour*, 67

2. *Perpetual decree, on prayer for temporary relief.*—Under a prayer to enjoin the removal of mining machinery, etc., until the further order

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PLEADING AND PRACTICE. *Continued.*

of the court pending proceedings to determine the forfeiture of the lease, the court may, on the hearing, make the order *perpetual* if satisfied there never should be any further order to the contrary. *Wilmington M. Co.* v. *Allen*, 107

3. *Decree on the entire pleadings.*—Where a bill, cross-bill, petition and answer thereto, relating to the same subject-matter, are consolidated and heard together and a decree rendered, it will be considered as made in view of all the allegations contained in all the pleadings, although the petition and cross-bill may have been dismissed on the hearing. *Id.*

4. *Variance between statement and copy.*—Where there is a material variance between the contents of an instrument, as stated in the complaint, and as shown by copy filed, the copy will control. *Watson Coal Co.* v. *Casteel*, 130

5. *Excluded offer.*—When the object of an offer of testimony is not disclosed by the record the court will presume in favor of the ruling below. *Id.*

6. *Assessment of damages by clerk of court.*—The plaintiff, by a special count, set out that the defendants agreed, in writing, to pay him "$150, on the 1st of October, 1866; $150 on the 1st April, 1867; $150 on the 1st October, 1867; and $150 on said dates semi-annually thereafter, a copy of which agreement is hereto attached," etc. *Held*, to be sufficiently specific for the court to order a liquidation by the prothonotary. A copy of the claim being filed, showed that no more could be recovered than was due on it. *Johnston* v. *Cowan*, 299

7. *Insufficient denial of averment of labor.*—The complaint charged that labor was performed on a certain mining claim and the denial was a denial that he worked for the defendant. *Held*, an admission that the work performed and sued for was done upon the claim specified. *Bradbury* v. *Cronise*, 366

8. *Findings inconsistent with pleadings.*—A finding contrary to the admissions of the pleadings must be disregarded. *Id.*

9. *General objection.*—An objection to testimony as to the extent of a location as given by a witness: *held*, too general to be considered. *Dunning* v. *Rankin*, 455

10. *A Nevada transcript.*—Papers and testimony copied into the form of a transcript, without certificate of judge or clerk, do not constitute a transcript, but were, under the circumstances, considered as such. *Van Valkenburg* v. *Huff*, 467

11. *General charge.*—In the statement of a general principle of law, it is not improper for the court to allude to exceptions to the rule, or to notice such circumstances as would prevent its operation. *Id.*

12 *Error, not followed up.*—Where the record shows an improper question asked, objected to, and the objection overruled, the record must further show, to be error, that the improper question was answered by the witness. *Myers* v. *Spooner*, 519

13. *New trial—Error without injury.*—Even where error may have intervened, a new trial should not be granted when it is clear that no injury has been done, and that the verdict ought, upon the whole record, to stand as it is. *North Noonday Co.* v. *Orient Co.*, 525

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PLEADING AND PRACTICE. *Continued.*

14. *Judgment on referee's report.*—The rule that a judgment will not be disturbed unless manifestly against the weight of evidence, does not obtain where the testimony has been taken before a master or referee. *Miller* v. *Taylor*, 547

15. *Motion to withdraw counter-claim.*—When the record shows that after the testimony had closed, and before the court had finished charging the jury, the defendants moved for leave to withdraw their counter-claim, which motion was overruled, such ruling will not be disturbed unless manifest injustice is done thereby. *Isaacs* v. *McAndrew*, 691

See LICENSE, 37; LIEN; MARRIED WOMEN, 3; NONSUIT, 1; POSSESSION, 5; VERDICT, 1.

POSSESSION.

1. *Facts amounting to possession and constructive notice.*—A purchaser at execution sale of mineral land has constructive notice of an outstanding lease where the lessee has possession; and he has possession so long as he is working the premises in a miner-like way—working steadily except when prevented by water, and leaving tools in the mine when absent. *Chamberlain* v. *Collinson*, 36

2. *Possession and compromise as affected by threats.*—The right to possession of a mine being in dispute plaintiff nevertheless gave defendants permission to work in a certain part thereof. Defendants' right to the possession of the whole was afterward established. *Held*, that this permission, accepted under threats to stop all work, did not affect their right to work the whole of the ground or to establish their right so to do. *Id.*

3. *Possession extends to bounds.*—When a claim is distinctly defined by physical marks, occupation of a part is possession of the whole, although the party does not enter under district rules (affirming *English* v. *Johnson*, 17 Cal. 108), and the exclusion of evidence tending to prove such a possession as would justify a recovery in ejectment, deprives the jury of the means of arriving at a just conclusion. *Table Mountain Co.* v. *Stranahan*, 457

4. *Possession in case of too extensive claim.*—Where the quantity of ground claimed is unreasonable, the possession under such a location will be restricted to the ground actually occupied. *Id.*

5. *Definite findings, to support decree.*—The findings to support decree based upon actual possession, must show that plaintiff had possession of a definite portion of the ground in controversy. *Gelcich* v. *Moriarty*, 498

6. *Presumption of continued possession.*—Possession of a shaft being shown at one time, the burden of proof is upon the party who asserts that it did not continue. *Faxon* v. *Barnard*, 516

7. *Actual possession of a mining claim.*—The purchaser of a mining claim properly located and marked on the ground, and who is by his agents engaged in working and developing the claim and in keeping up the boundary stakes and marks thereof, is not merely in the constructive possession of such claim—his possession is *a possessio pedis* extending to the boundary lines of the claim. *North Noonday Co.* v. *Orient Co.*, 521

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POSSESSION. *Continued.*

See LOCATION, 26; NOTICE, 1; STATUTE OF FRAUDS, 4; TENANT IN COMMON, 1.

PROSPECTING CONTRACT.

1. *Reasonable time to prospect.*—Where a conveyance was to be made of land if the vendee should find oil upon it, it is to be construed that oil must be found within a reasonable time. *Dark* v. *Johnston*, 283

PUBLIC DOMAIN.

1. *Vested rights in mineral lands.*—One who makes a valid location of a mineral lode and complies with the mining laws, local and national, obtains a vested right to such property, of which he can not be divested. *Blake* v. *Butte Silver M. Co.*, 503

RECEIVER.

1. *Court instructing receiver.*—The circuit court may properly instruct a receiver as to the management of property, upon petition filed by him in the suit in which he is appointed, against others claiming the property, and if the rights of such other parties are established there is no error in ordering the receiver not to disturb their possession until the further order of the court upon the dismissal of the petition. *Wilmington M. Co.* v. *Allen*, 106

2. *Discretion of court where a going mine is in litigation.*—Where property of an insolvent corporation is in the hands of a receiver, bills brought by and against him may all be regarded as applications to the court having jurisdiction over the receiver and the business respecting the administration and management of the property; and where leasehold interests are involved, depending for their preservation upon continuing the operations of a mine, whether it should be kept going is a matter of business economy as well as of law; the jurisdiction in such cases is largely discretionary and will not be interfered with, short of a case of flagrant error or injustice. *Id.*

RECORD.

1. *Changing names of locators on the record.*—Where one of the locators' names had been erased from the recorded notice (location certificate), and the name of another party substituted: *Held*, that notwithstanding such change the record was valid as to outsiders. *Gleeson* v. *Martin White Co.*, 429

2. *Changing courses on the record.*—Besides the change of names, the location certificate as recorded in the district record contained for the course of the lode the words "westerly" and "easterly." These were changed to "northerly" and "southerly," but without any fraudulent intent. *Held*, that the changes were immaterial. were no proof of abandonment of the original location, and that the facts of the case did not present any question of estoppel. *Id.*

3. *Record or office copy of deed or power of attorney.*—A deed or power of attorney can not be proved by the record thereof, or by a copy taken from the record, except in the manner prescribed by section 19 of the chapter relating to conveyances. *Sullivan* v. *Hense*, 487

4. *The preliminary affidavit* mentioned in that section should be

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RECORD. *Continued.*

made by all of the persons, plaintiffs or defendants, by whom the record of an instrument, or the copy thereof, is offered in evidence. *Id.*

5. *Record or office copy of certificate of location.*—A certificate of location of a mining claim may be proved by the record or by a transcript from the record under another statute without the affidavit of the party desiring to use it as to the possession of the original certificate. *Id.*

6. *A record is not essential* under the act of Congress, unless made obligatory by local regulations. *Southern M. Co.* v. *Europa M. Co.*, 513

7. *Sufficiency of record.*—A location notice of record calling for corner monuments, and described as bounded by four other claims, *held* a sufficient description. *Id.*

8. *Failure to record within statutory period.*—Failure to record the location certificate within the three months from date of discovery as required by statute of Colorado, does not invalidate the claim when the record has been completed before another title has been perfected to the same ground. *Faxon* v. *Barnard*, 515

9. *Idem—Facts of the case.*—The Green Mountain lode was discovered in August, 1877, but its record was not made till March, 1878. The Ontario lode was discovered in February, 1878, and its record made in July of the same year. Their surveys overlapped each other. *Held*, that the Green Mountain had not lost its priority by the delay in filing its location certificate. *Id.*

10. *Record of mining claim.*—Where the district rule requires a record, it is necessary, otherwise not. A valid record must contain the name of the locator, the date of location, and such a description by reference to some natural or permanent monument as will identify the claim. *North Noonday Co.* v. *Orient Co.*, 530

11. *Certified copies of instruments recorded* are admissible in evidence without proof of the execution of the originals. *Kramer* v. *Settle*, 561

12. *Local statute as to proof of right to record.*—When a location notice is filed in the names of several persons as co-locators it will be presumed that the recorder had not filed it without the statutory proof required by section 5 of the Idaho Mining Act. *Id.*

13. *Evidence dehors the record.*—The court can not review matters not presented in the record of the cause. *Conner* v. *McPhee*, 570

See LOCATION CERTIFICATE; MISTAKE, 2.

RELATION.

1. *Relation in case of mining patents.*—The doctrine of relation can not be applied so as to cut off the rights of the earlier patentee under a later location. *Eureka M. Co.* v. *Richmond M. Co.*, 578

See LIEN, 41.

RENTS AND ROYALTIES.

1. *Demand of rent in unlawful detainer.*—If the landlord bring unlawful detainer he can sustain the action (if at all) only after strict proof of demand of rent as at common law, and proof of a re-entry, or its equivalent, before commencement of his action. *Bowyer* v. *Seymour*, 67

2. *Assignee.*—An assignee is jointly liable for rent with the lessee. *McDowell* v. *Hendrix*, 96

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RENTS AND ROYALTIES. *Continued.*

3. *Threat to foreclose on previous mortgage* is clearly no defense in action for rent against lessee. *Id.*

4. *Judgment for rent of coal lands—Title to coal.*—The recovery of a judgment for rent under a coal lease does not vest the title to the coal not mined in the lessee, no matter whether the judgment is collected or not. *Austin* v. *Huntsville Coal Co.*, 115

5. *Royalty upon ore which mine will produce.*—A mining lease was made whereby the lessees undertook to mine two thousand tons per annum, and pay a royalty of one dollar per ton, and to pay $2,000 per annum, whether they took two thousand tons or not, "provided that quantity can be got upon the said demised premises," and a sufficient quantity of water could be there had to wash that amount; and if two thousand tons could not be "mined with advantage," to pay for the amount actually mined; after the lessees entered, the ore was found to be poor in quality, and not profitable to be mined in seasons of low prices, but yet not so unmerchantable as to be of a different quality from the article contracted for. *Held*, 1. That the amount which could be mined in any one year must be paid for. 2. That equity would not enjoin the lessors from bringing an action for royalty or a portion thereof. *Kraber's Appeal*, 127

6. *Royalties, no payment on rent.*—The offer to prove full payment of the royalties on all coal mined and the exhaustion of the mine: *Held*, irrelevant in a suit for minimum rent, unless such royalties *exceeded* the minimum rent. *Watson Coal Co.* v. *Casteel*, 130

See EXECUTORS, 1; FORFEITURE, 1; LEASE; LICENSE, 28.

RES ADJUDICATA.

1. *Former judgment against landlord no bar in Pennsylvania.*—Proceedings were commenced before two justices by a landlord, and the inquest found for the tenant. Upon a second proceeding brought by the landlord, carried into court upon the tenant's affidavit of title acquired, *held*, that evidence of the former proceeding was not admissible. *Newmoyer* v. *Andreas*, 292

2. *The ruling of the Supreme Court in a particular case* becomes the law of that case, upon further proceedings, even upon points not essential to the decision. *Table Mountain Co.* v. *Stranahan*, 465

3. *Application of the rule.*—The Supreme Court, upon the former appeal, having passed upon the extent of ground to which a location was limited, and the language of the court having been embodied in an instruction asked on the second trial, it was error to refuse it, as the law of the case. *Id.*

RESERVATION—See LICENSE, 2.

RIPARIAN RIGHTS.

1. *State patent on river bed.*—A warrant under the act of 1848, and a survey thereon of the bottom of the Monongahela river, passes not the title *to the soil*, but the right "to dig and mine for iron, coal, limestone, sand, gravel and fire clay." The warrantee does not acquire the right to the sand deposited on the bed of the river by the current; the right to that

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RIPARIAN RIGHTS. *Continued.*

remains in the commonwealth. The patent granted only the right to dig and mine under the bed of the river. *Brandt* v. *McKeever*, 216

See LICENSE, 42.

SEAL.

1. *Adoption of scroll as seal of several.*—A deed purporting to be executed under the hands and seals of the grantors, is the deed of all the signers, although there be not a scroll opposite each name. *Lunsford* v. *La Motte Co.*, 309

SLANDER—See LIBEL AND SLANDER.

SPRINGS.

1. *Spring tapped by mining.*—The fact that a mere "wet weather" spring might be injured by working a mine is not important. Even if a valuable spring, it seems that its destruction, if a necessary incident to mining under a lease, would be *damnum absque injuria*. *Trout* v. *McDonald*, 32

STATUTE.

1. *The day of the date of the passage of an act* is to be excluded from the period during which it operates. *Hunter* v. *Savage M. Co.*, 357

See LIEN, 21, 31.

STATUTE OF FRAUDS.

1. *Statute of Frauds not invoked to favor trespasser.*—An oral lease of land for a longer period than one year is void; but where the term for which the lease was given does not appear, it will not be assumed that it was within the statute, although the plaintiffs may have held under it for more than a year; against trespassers it would be assumed that they held as tenants from year to year. *Ganter* v. *Atkinson*, 13

2. *The agreement was signed by the grantor*, and the firm name of the grantees was signed by one of them. *Held*, that if it were the grant of an interest in land, it was a sufficient signing within the Statute of Frauds, the owner having signed, which bound him. *Johnston* v. *Cowan*, 300

3. *Idem—Grantee need not sign.*—The owner who conveys must be bound by writing, but the other party, for anything contained in the statute, need not so be bound. *Id.*

4. *Possessory rights are not within the Statute of Frauds;* they may be conveyed by the transfer of possession. *Table Mountain Co.* v. *Stranahan*, 457

See LICENSE, 11, 12, 20, 24; TIMBER, 1.

STOCK—See MANDAMUS, 3, 4.

SURFACE—See LOCATION, 20, 21.

SURFACE SUPPORT—See COLLIERY, 1.

TAILINGS—See LOCATION, 6.

TENANT IN COMMON.

1. *The possession of one tenant in common* inures to the benefit of all in the absence of some decisive act amounting to an ouster. *Van Valkenburg* v. *Huff*, 467

See LIEN, 17, 18; PARTNERSHIP.

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TIMBER.

1. *Statute of Frauds.*—Agreements for the sale of growing timber, not made with a view to immediate severance, are contracts for the sale of interests in land and within the Statute of Frauds. *Huff* v. *McCauley*, 268

TIME.

1. *Essentiality of time.*—The necessity of stringent provisions as to time in contracts concerning oil property recognized. *Christie's Appeal*, 42

See MASTER AND SERVANT, 8, 11; PROSPECTING CONTRACT, 1.

TRESPASS.

1. *Trespasser settling with pretended lessee.*—The defendant, in an action for trespass, in taking coal from plaintiff's land, can not take shelter under an alleged settlement and accounting with a party who has accepted a lease of the coal land from the plaintiff, but who has never made an entry thereunder. *Austin* v. *Huntsville Coal Co.*, 115

2. *Trespass by lessor—Outstanding lease.*—The owner of coal lands may maintain trespass for the invasion and injury of his possession by mining coal, and for the permanent injury to the freehold caused thereby, although there is an outstanding lease for the same premises, provided possession has not been taken under the lease. *Id.*

3. *Forcible resistance to trespass.*—The owner of a mine in possession may resist with so much force as may be necessary, a trespasser, the pretended assignee of an unassignable license, entering to dig and take away the ore. *Riddle* v. *Brown*, 219

4. *Evidence of malice to prove excessive force.*—Evidence of personal feeling and of previous threats, though uncommunicated to defendant, is admissible upon the question of whether excessive force was used in preventing a trespass upon the ore bank of defendant. *Id.*

See LEASE, 3; LICENSE, 6, 13, 22; MEASURE OF DAMAGES, 1-3; STATUTE OF FRAUDS, 1.

TUNNEL—See LIEN, 49.

VARIANCE—See LIEN, 8; PLEADING AND PRACTICE, 4.

VENDOR AND PURCHASER—See LOCATION, 11.

VERDICT.

1. *Verdict against weight of evidence.*—The appellate court will not disturb the verdict of a jury on the ground that it was not justified by the evidence, when there was a substantial conflict in the testimony, even though it is greatly against the weight of evidence. *Wilson* v. *Fitch*, 156

WAGES—See LIEN; MORTGAGE, 1.

WARRANTY—See LEASE, 21.

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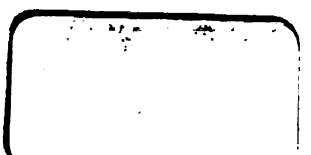

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